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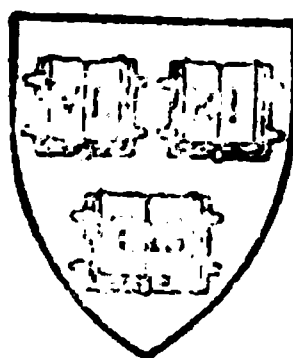
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HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

BY R. M. STOVER,
REPORTER.

VOLUME LXV.

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PRACTICE REPORTS.

SUPREME COURT.

JOHN W. VELIE agt. THE NEWARK CITY INSURANCE COMPANY
and JOHN A. THOMPSON.

Practice in pleading— Complaint may state several grounds or reasons for the relief demanded, or may be framed to meet the contingencies of the trial.

A plaintiff may in his complaint state several grounds or reasons for the relief demanded; and he also may, where there is some uncertainty as to the exact ground of recovery, so frame his complaint as to meet the contingencies of the trial.

Where a plaintiff has really ten distinct and separate reasons for the obtainment of the relief demanded in the complaint, and states each one therein separately and plainly, or where the plaintiff and his attorney are somewhat uncertain as to the exact ground of recovery the proof may afford, and therefore frame a complaint for the recovery of a single claim in several distinct counts or statements so as to meet the proof, an election will not be compelled.

Ulster Special Term, February, 1883.

MOTION by defendant to compel the plaintiff to elect between two separate statements of a single cause of action, and also to state the interest of the defendant Thompson in the insured property with more certainty and definiteness in the complaint.

G. A. Clement, for insurance company and motion.

John J. Linson, for plaintiff and opposed.

WESTBROOK, J.— The plaintiff John W. Velie, as the assignee of Giles W. Cowley, seeks to recover of the defendant, The Newark City Insurance Company, the sum of \$1,250, with interest from January 4, 1882, that being a portion of the loss which Cowley is alleged to have sustained in the

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destruction by fire of certain property of which he was then the owner.

The complaint states separately two grounds or reasons for the liability of the Insurance Company: First. That such defendant, in consideration of twenty-five dollars paid to it by said Cowley, issued to him its policy of insurance by which it agreed to insure him for the term of one year from December 24, 1881, against loss or damage by fire upon certain property described in the policy and fully set out in the complaint to the amount of \$1,250; and, second. That the said Insurance Company by its duly authorized agents, Messrs. Ogden & Little, of Middletown, Orange county, New York, on or about December 24, 1881, for a consideration agreed to be paid by the said Cowley, promised and contracted to insure the said Cowley against loss or damage by fire to the same property to the extent of \$1,250 for the period of one year and to issue its policy therefor.

The complaint also avers that by the policy of insurance the loss, if any, was "first payable to John A. Thompson, mortgagee, as interest may appear;" that Cowley was the sole owner of the property insured and destroyed, both at the time of its insurance and of its destruction by fire on January 4, 1882, subject, however, to a mortgage thereon owned by the defendant Thompson to secure the payment of \$2,250; and that the Insurance Company has not paid the amount of the insurance to Thompson, nor has Thompson brought any suit to recover the same, and that the company refuses and neglects to make such payment.

The Insurance Company by this motion asks: First. That the plaintiff shall be compelled to elect and decide whether he will rely for a recovery upon the written policy of insurance, or upon the agreement to insure and to issue a policy; and, Second. That the complaint should state more definitely and certainly the interest of Thompson in the insured property. Should the relief asked, or any part thereof, be granted?

The question which the application to compel the plaintiff

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to elect between the two grounds of recovery stated in the complaint presents is this: When a plaintiff has really two distinct and separate reasons for the obtainment of the relief demanded in the complaint, and states each one therein separately and plainly, or where, as is probably the case in this instance, the plaintiff and his attorney are somewhat uncertain as to the exact ground of recovery the proof may afford, and therefore frame a complaint for the recovery of a single claim in several distinct counts or statements so as to meet the proof, should an election be compelled?

In the discussion of this question it must be admitted that the defendant has several reported cases which support his proposition (*Gardner* agt. *Sock*, 2 *N. Y. Civil Pro. R.*, 252; *Comstock* agt. *Hoefst*, *N. Y. Monthly Law Bulletin* [vol. 1], 43; *Dickens* agt. *N. Y. Central R. R. Co.*, 13 *How.*, 228). Some of the reported cases were rightly decided upon other grounds than that which holds that a party plaintiff must be limited to a single statement of facts giving him a right to the relief demanded, when in truth there are other facts also entitling him to such relief, or when more than one statement is necessary to meet any contingency of the trial. The soundness of the rule compelling an election has never favorably impressed me, and reflection upon the present motion has fully confirmed those impressions. In the discussion of a legal problem there generally are several reasons tending to a certain conclusion, all of which counsel in argument would present; and so in the trial of a cause there generally are distinct and separate lines of fact tending to give the same one relief asked which a careful pleader should embody in the complaint. It would seem to be absurd for a judge to limit counsel to the presentation of a single reason upon the argument of a legal proposition; and to me, at least, it seems equally absurd to limit a party to the statement in his complaint of one line of facts establishing his right of recovery when he has really several, or when the court can plainly see, as it can in this case, that different averments are proper

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to meet an emergency of the trial which cannot be foreseen prior to its occurrence. Take, for instance, the case of a party who is the heir-at-law of a deceased testator, seeking, under section 1537 of the Code, to partition and to recover property held under an alleged will. The reason which he assigns in his complaint for a recovery is that the apparent devise, under which the property is held, is void, because: First. The testator was legally incompetent to make a valid will. Second. That the instrument alleged to be a will, was procured by fraud and under influence; and Third. That the execution thereof was insufficient and defective. In a case like the one just put, or in one like that before us, in which it is often very difficult to decide whether a policy of insurance has actually been issued, or whether there has been only an agreement for insurance and for a policy, can any good reason be adduced for compelling the plaintiff in advance of a trial, or even at the trial, to elect upon what ground he will stand and present his case? If either or both are tried, the proof upon each ground of recovery stated may be close and conflicting. A jury of twelve men may be divided in opinion as to which one is established, while all may unite, some for one reason and some for another, in the conclusion that the plaintiff is entitled to recover. If, under such circumstances as have been stated, an election is compelled, justice may fail and wrong succeed. It is no answer to this argument to say that if the plaintiff is unsuccessful another action can be brought setting up a ground of recovery not pressed upon the first trial. The right to bring a second action for the same subject matter, though for a different cause, is more than doubtful; but even though the judgment in the first action is no bar to the second, why should a party fail in the relief to which he is in fact entitled, and which he would have obtained on the first trial if he had been allowed to state his entire case in the complaint and be subjected to the delay, cost and vexation of a new trial, by the adoption of a rule which limits the complaint to the statement of a single

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reason or ground for a recovery. The second trial, too, might fail, if the issue was limited by the court compelling an election, because twelve men could not agree to sustain a recovery upon that single reason or ground. The practical effect of the rule is obvious. A plaintiff may often fail to obtain that which is his due, because he presents his grounds of recovery singly, when he might succeed if they were all presented in one suit; and often though he may succeed in the end, he has suffered in costs, delay and vexation, which could and should have been avoided. A defendant may present as many defenses as he has to a single claim, though, on the face of the answer, they may seem to be inconsistent, and no good reason can be given why a plaintiff may not present by his complaint as many different statements of distinct lines of fact as he has, or as he supposes himself to have, giving him the right to the relief which he asks. It undoubtedly is the interest of the defendant to limit the plaintiff in every action, as is now sought to be done by this motion, but as in the administration of justice every argument should be weighed and every pertinent fact considered, it cannot be conceded that on the trial of an issue of fact a plaintiff should be limited in his facts to a single ground of recovery, any more than upon the discussion of a legal problem, he should be limited to the statement of a single argument.

The point which has been discussed is not new to the judge writing this opinion. In *Talcott* agt. *Van Vechten* the plaintiff sought to make the defendant liable for a debt due the former from "The Olcott Iron Company." The complaint alleged in two separate statements, two distinct lines of fact tending to make the defendant liable for that demand. On a motion made at special term to compel the plaintiff to elect between the two, such motion was denied upon the ground (stated in a memorandum) that it was "the right of the plaintiff to set forth all the facts which made the defendant liable," and that the statement of "two distinct grounds of liability" for "only one cause of action" was proper. On appeal to the

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general term of the third department, this decision was affirmed (25 *Hun*, 565). In this department the question argued must therefore be deemed settled.

Perhaps one other thought on this point may be separately added, though it has already been suggested. It is impossible for a party or his counsel to know in advance of a trial the exact facts of a case. It is often difficult in an action like the present to determine whether there was an actual insurance, or a simple agreement to insure and deliver a policy. There may be danger in presenting the case upon a single ground, while a recovery may be certain if the plaintiff is allowed to present both. Many other cases of like uncertainty will readily occur to the mind of a practicing lawyer. Why, it may well be asked, unless justice is to be hampered, should a party be compelled to do that which may result in his defeat, when justice and right require his success? So to construe and interpret the Code defeats its entire object, which was to simplify and make easy, and not to perplex the administration of justice. Precisely this view of this question was taken many years ago by judge COWLES, with the concurrence of the judges of the general term, in *Jones agt. Palmer* (1 *Abb. Pr. R.*, 442), and it seems to be so clearly right as to preclude discussion.

But a single word need be added upon the second application, that to compel a more definite statement as to the interest of John A. Thompson in the insured property. It is difficult to see how the complaint could be made more explicit in that particular. It is distinctly stated that he held a mortgage at the time of the fire to secure the payment of \$2,250. What effect, if any, this fact may have upon the rights of the plaintiff is not before me, and is not determined. The allegation is definite, certain and clear, and cannot be made more so by additional averments.

The motion of the defendant must be denied, but without costs, as the moving party is sustained in its practice by several adjudged cases.

Kingsland *et al.* agt. Leonard *et al.*

SUPREME COURT.

DANIEL C. KINGSLAND *et al.* agt. JANE MARIA LEONARD *et al.**Will—construction of.*

A., who died in 1814, leaving two sons and two daughters, by his will gave his residuary estate to his son B. and to his heirs; but in case B. should die without lawful issue, he gave it "to my remaining children, share and share alike." The other son died in 1859, leaving four children, the plaintiffs in this action. B., the residuary devisee, died in 1881, without issue:

Held, that plaintiffs are entitled to their father's one-third interest in the estate.

Special Term, April, 1883.

Joseph H. Choate for plaintiffs.

Edward B. Merrill and *N. Quackenbos*, for contesting defendant, Jane M. Leonard.

Valentine Marsh, for non-contesting defendants.

LARREMORE *J.*—After examination of the judgment-roll of *Leonard* agt. *Kingsland*, in the court of common pleas, I am satisfied that the plea of *res adjudicata* cannot prevail, and that the decision in this case must depend upon the construction of the following clauses of the will of Daniel Kingsland, the elder:

"All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath unto my son Daniel Kingsland and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children share and share alike."

The testator died April 18, 1844, leaving four children him surviving, viz.: Daniel Kingsland (the residuary devisee), Thorn S. Kingsland and two daughters, Mrs. Leonard and Mrs. Schnyler, two of the present defendants.

Thorn S. Kingsland died June 12, 1859, leaving him surviving four children, the plaintiffs in this action.

Kingsland *et al.* agt. Leonard *et al.*

Daniel Kingsland, the residuary devisee, died September 30, 1881, without leaving lawful issue, leaving a will reaffirming the residuary clause contained in his father's will; and the question presented is, whether or not the children of Thorn S. Kingsland have succeeded in the right of their father to any interest in the residuary estate of Daniel Kingsland, the elder.

It was once aptly observed that "no will has a brother." Every instrument of this character must stand upon its own provisions and be interpreted in the light of its own intention.

Unquestionably grandchildren will not be included in a devise to children, which word must be understood in its primary sense unless a different intention be clearly expressed or may be fairly inferred from the instrument, taken as a whole (*Palmer agt. Thorn*, 84 N. Y., 516).

At the time of his death, testator's remaining children, other than Daniel, were Thorn S., and his two daughters. There can be no doubt that they were the objects of his bounty if the defeasible fee vested in his son Daniel should terminate.

There is nothing in the context of the will to show that the term "remaining children" was used in a restricted sense as analogous to living or surviving children, which was the case in *Wylie agt. Lockwood* (86 N. Y., 291).

The evident intention was that the residuary estate should be equally divided among all testator's children, if Daniel died without issue.

All of the testator's children were alive when he died, and by the third clause of his will he directs that in case his daughter Hannah Catherine (who was then unmarried) should die without issue, the legacy bequeathed to her should be equally divided among his other children, Jane Maria, Thorn S. and Daniel.

Suitable provisions are also made by the will for the sons of Thorn S., and there is no manifest intention that they should be ignored in the distribution of the estate (*Prowitt agt. Rodman*, 37 N. Y., 42).

Shethar agt. Sherman.

But if this view should be incorrect, the plaintiffs, as children of Thorn S., represent their father's interest in the estate. He was living when his father died, and had an expectant interest in the residuary estate, which was descendible, devisable and alienable (1 *R. S.*, 725, 773).

Such interest, though contingent during his life, vested absolutely upon the death of his brother Daniel without issue.

The case of *Miller agt. Emans* (19 *N. Y.*, 384) relates to a devise which took effect in 1810, prior to the adoption of the Revised Statutes, and is not in point.

The plaintiffs are entitled to judgment.

SUPREME COURT.

SAMUEL SHETHAR and another, executors, &c., agt. JANE ANTOINETTE SHERMAN and others.

Extrinsic evidence to explain will — Specific legacies.

By the different clauses of the testator's will, gifts of railroad stock owned by him were made to his children, and to other persons and societies, literary and religious, in various amounts. By the twenty-fourth clause he directed, that should there be a deficiency of assets to pay in full all the bequests, the bequests to his children in the first four clauses should first be fully paid.

Held, that the gifts of railroad stock were not severally specific legacies required to be paid in full, without reference as to whether there were assets to pay the pecuniary legacies provided in the first four clauses.

Parol contemporaneous evidence not admissible to show intention of testator.

Special Term, March, 1883.

Marsh, Wilson & Wallis, for plaintiff.

Theodore W. Dwight, for defendant A. M. Swift and others.

Shethar agt. Sherman.

George F. Comstock, John McDonald, Everett P. Wheeler, Julien T. Davies, L. Laflin Kellogg, L. D. Olmstead, Chas. Edward Tracy, Gray & Davenport, E. M. Wight and R. B. Tunstall, for other defendants.

VAN VORST, J.—After a careful consideration of the will of the testator John H. Swift, deceased, and the arguments of the counsel who have appeared for the several parties, I reach the conclusion that the legacies, both of money and railroad stock, mentioned in the first four paragraphs of the will in favor of the testator's children and family, are entitled to priority in payment in full over all the others. To my mind there is no ambiguity in the twenty-fourth clause of the will, which calls for extrinsic evidence, or which would justify the receiving in evidence, as expressive of the testator's intention, his letter of the 25th September, 1873, written some days before the actual publication of his will. The admission of such evidence would be in violation of clearly understood rules, which forbid parol contemporaneous evidence to vary the terms of a valid written instrument. The will is the highest and surest expression of the testator's intention. There are, it is true, cases of ambiguity or equivocation which afford exceptions to the rule, but there is nothing in the will under consideration which gives occasion to depart from the rule. This letter will, therefore, be left out of consideration.

What is itself clear, needs no demonstration by extrinsic proof. Cases in which parol evidence may be admitted are referred to and classified in *Hawkins on Wills*, 9-13.

By the different clauses of the testator's will, gifts of railroad stocks owned by him were made to his children and to other persons and societies, literary and religious, in various amounts. But by the twenty-fourth clause of his will, the testator orders and directs that, should there be a deficiency of assets to pay in full all the bequests and the legacies mentioned in his will, they shall not abate equally, but that certain of them should have priority over the others, and he directs

Shethar agt. Sherman.

that the bequests made by the first, second, third and fourth clauses shall constitute the first class, and shall be fully paid and satisfied.

He then proceeds to group several legacies in a second class to stand on an equality amongst themselves, and to be next paid and satisfied, and finally he constitutes a third class of legacies to stand on a like equality amongst themselves, and to be next paid and satisfied. With regard to the third class, however, the words are added, "and in case of deficiency shall abate ratably."

Notwithstanding the benevolence of the testator, general and special, which his will so clearly exhibits in making provision for objects and persons which commended themselves to his judgment, conscience and affection, yet as the ties of blood are imperative, it is only natural to suppose that the testator should prefer, in the event that his estate could not meet all the demands which he had imposed upon it, and there should prove to be a considerable or any deficiency, that his children should have precedence in payment over the legacies created in favor of others, and should not abate with them.

It seems quite clear from the language of the twenty-fourth clause above given, that the testator intended that what he had given to his children should be fully satisfied before his means should flow into the other channels indicated by him.

In opposition to this view it is urged by the counsel for the other legatees that all the gifts of the shares in the two railroads mentioned in the will, are specific, and that they possess the attributes and draw to themselves all the peculiar advantages belonging to legacies of that description; and that as the testator at his death possessed those shares or others into which they had been transmuted during his life, in substance the same, these legacies must in any event be paid in full, although there may remain no assets to pay the pecuniary legacies provided for in the first four clauses of the will in favor of the testator's children. This is the most important question in

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this controversy, but from what I have already suggested this view cannot, I am persuaded, be sustained.

Taking together all that is said in the will about this stock and its condition there is much, but not enough, to favor the idea that the gifts of the railroad shares were severally specific and should in any event be all satisfied.

Confining ourselves to the words of the bequests alone, the weight of authority would seem to be, that the gifts are not of specific shares owned by the testator. The words of the first clause are: "I give and bequeath to my son John Lakin "also forty thousand dollars of the capital stock of the St. Louis and Iron Mountain Railroad Company, and fifty thousand dollars of the capital stock of the Cairo and Fulton Railroad Company, both stated at par value." The other bequests are substantially in the same words. No number of shares as such are given, but the word "dollars" is uniformly used.

Hawkins adduces as a rule of construction that "a legacy of stock of whatever denomination is not *prima facie* specific, but is a general legacy although the testator may have had stock of the description mentioned sufficient to answer the bequest." In support of that deduction he cites *Simmons* agt. *Vallance* (4 Bro. C. C., 345); *Purse* agt. *Snaylin* (1 Atk., 414); *Sibley* agt. *Perryn* (7 Ves., 523; *Hawk. on Wills*, 301, *marg.*).

In *Tift* agt. *Porter* (8 N. Y., 516) the facts to justify a conclusion that the gifts were specific, were certainly as imperative as they are in the case under consideration, yet it was there held that the legacies were general. There the testator bequeathed 240 shares of the Cayuga County Bank to his wife, which were to be delivered to her as soon as might be after letters testamentary had been granted and "in lieu of dower." The testator also bequeathed 120 shares in the same bank to another legatee to be delivered in like manner. At his death he owned 360 shares of the stock of the Cayuga County Bank. In that case it was held that the will gave no indication that the shares bequeathed were to be taken from

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those owned by the testator, and that in order to make the legacy specific the testator must have used some expression from which an intention to make a bequest of particular stock might be inferred, as, for instance, where the testator uses such language as "my shares," or any other equivalent designation. The cases of *Langdon* agt. *Astor, Executors* (1 *Duer*, 478-546; *S. C.*, 16 *N. Y.*, 9, 33); *Giddings* agt. *Seward* (16 *N. Y.*, 365), are in the same direction.

The rule extends to bequests of any description of stocks or shares capable of being bought in the market. Thus in *Sleech* agt. *Thorington* (2 *Ves. Sr.*, 560) where a gift of £400, East India bonds, to A. in trust, &c., was held to be a general legacy. See, also, *Robinson* agt. *Addison* (2 *B.*, 515); *Ashburner* agt. *Macquire* (2 *Bro. C. C.*, 108) in which it was held that a legacy of "my" £1,000, East India stock, was held specific. In *Mytton* agt. *Mytton* (*L. R.*, 19 *Eq.*, 30) a gift of the sum of £3,000 invested in India security was held by MALLINS, V. C., not to be specific (*Bothamby* agt. *Shersan*, *L. R.*, 20 *Eq.*, 304; *Norris* agt. *Executors, John B. Thompson*, 2 *McCarter*, 493; 16 *N. J. Eq.*, 250).

It may be considered that the classification of gifts as to whether, in particular instances, they are specific or general is difficult. The cases, which are numerous, can hardly be reconciled. And the result reached seems often quite arbitrary.

A leading case (*Ashburner* agt. *Macquire, supra*) was decided by lord THURLOW after great consideration, he having held the same for advisement for two years before he gave judgment (*Chaworth* agt. *Beech*, 4 *Vesey*, 566).

Courts have manifested a reluctance to construe legacies as specific when any doubt clearly existed, from the fact that a specific legacy is liable to be adeemed, in which event the loss of the legatee cannot be made good out of the general estate (*Giddings* agt. *Seward, supra*). It must be conceded, however, that the intentions of the testator, to be gathered from the whole will, must be taken into account in determining this particular question, as well as all others, in the construc-

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tion of the will. I have already observed that there is much to justify the classification of the gifts of stock as specific. It is not necessary to allude to the provisions of the will which look in that direction. But all outside expressions, with regard to the gifts of stock, must be controlled by what is said in the twenty-fourth clause with regard to the legacies before declared, and their order of payment.

It is quite clear to my mind that the testator considerably intended that all other interests, however declared, should yield to the superior claims of his children, created in the first four clauses of his will.

This twenty-fourth clause expresses the weightier and controlling intention, and appears to be a summing up of the matter, and in view of it, what might otherwise be well considered specific gifts of railroad shares must yield to the superior direction that all the gifts to his children mentioned in the four clauses should have absolute priority in payment out of all the assets over all other legatees. That I regard as the true construction of that clause.

The result thus far reached is that out of the personal estate of the testator the legacies and bequests in favor of the persons mentioned in the first four clauses of the will shall be paid in full, in the order and upon the principles therein expressed, and what remains after satisfying those bequests shall be applied in the payment of the other legacies declared in the will, in the order of preference and manner mentioned in the twenty-fourth section of the will.

In no view of the case has any of the gifts been adeemed. Neither the change of the stocks in the testator's lifetime, in pursuance of the terms of the consolidation of the two railroads, nor the sale of the newly issued stock by Mr. Nathaniel Jarvis, as the committee of the testator, who had been adjudged subsequent to the execution of his will to be a lunatic, would have the effect to extinguish the gifts. The new stock in substance took the place of the old, and the sale by Mr.

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Jarvis, in a legal proceeding, was in no sense a transaction of the testator.

The testator's son, John Larkin Swift, a legatee named in the first clause of the will, died in the lifetime of the testator, but that contingency had been provided for, and the share given to him will take the direction indicated by the testator in that clause. I discern no real difficulty in effectuating the intention of the testator which is expressed with reasonable clearness, provided the terms of the will be followed. There is no occasion here for any directions other than those given by the testator.

With respect to the provisions in favor of the testator's son, Augustus Muhlenburg, it is sufficient now to say that the gift of the principal sum of sixty thousand dollars in trust for him during life is valid. Upon the event of his death questions may arise the determination of which it is not proper to anticipate. The gift of stock seems to be absolute to him.

I regard the directions of the will, in respect to the sale of the real estate and the purposes thereof, as an equitable conversion of the realty into personalty from the death of the testator. All the proceeds of the sale of the real estate will be needed to carry out the intentions of the testator, as declared in the will, and for the purposes of distribution must be deemed personal assets.

To work such conversion it is not always necessary that the direction to sell should be expressed in imperative language. It is enough if the authority to sell is ample, and the execution of the purposes of the will require it, as they do in this instance. Such conditions impose a duty and amount to a command.

The lapsed legacies fall into the residuary and are disposed of by that clause. I do not find any invalidity in the gifts severally declared, and no reason why they may not be satisfied, if the estate should be sufficient to pay them all in the order above indicated. No objection is interposed as to the validity of any gift except that contained in the twenty-second

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clause; with respect to that, one of the counsel in his brief says that it is illegal as creating "a perpetuity," and an unlawful "suspense of the absolute ownership of the property."

I gather that no particular stress is laid upon that point, as no argument is advanced in its support. Judge Comstock, the learned counsel for the four Bishops, has however submitted an able argument in support of that clause, to which no reply has been made, and I am inclined to adopt his view that the legacy is valid, and the gift is therefore upheld. This may not, however, in the end prove to be a practical question, for if what was stated upon the argument as to the value of the entire estate be correct, and if the view taken above with regard to the construction and effect of the twenty-fourth clause be sound, the gifts mentioned in the twenty-second clause may not be satisfied even in part.

The plaintiff's attorneys should prepare findings of fact and law, based upon the principles and conclusions above announced, in which distinct provision should be made for all interests adjudged and in the manner above announced, so that the will may be carried out, as above declared.

A copy of such findings and conclusions should be served upon the attorneys for each of the defendants who have appeared, to the end that amendments if necessary may be suggested by the parties for effectuating their interests under the will. This should be done within five days from the filing of this decision, and a notice of settlement of five days thereafter should be given.

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SUPREME COURT.

SAMUEL HIDES agt. MARY HIDES.

Divorce — When marriage and conveyance will be set aside as procured by fraud and undue influence — Code of Civil Procedure, section 1750.

While a belief in spiritualism is not *per se* sufficient cause for setting aside a marriage and a conveyance of property, yet where a shrewd, designing, lewd and unchaste woman, in middle age, knowing that an old man who is deaf and living in seclusion is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance, pretends to be a medium and to receive communications from spirits commanding that they marry and that the old man convey to her valuable property, claims to be a clairvoyant physician and to be able to cure his deafness, and by other fraudulent devices induces the old man to marry her and to convey to her the property, the marriage and conveyance will be set aside as procured by fraud and undue influence when the court is satisfied from all the evidence they were so procured.

Schenectady Special Term, March, 1883.

THIS was a suit to annul a marriage between plaintiff and defendant, and to set aside a conveyance to defendant by plaintiff at the time of the marriage, on the ground that the marriage was brought about and the conveyance obtained from plaintiff by defendant by means of fraud and undue influence.

The cause was referred to Hon. A. D. WARR, who found the following facts and conclusions of law :

1. This suit was commenced October 19, 1880, and a copy of the complaint and a *lis pendens* filed in the clerk's office of Saratoga county on the same day. 2. On the 29th day of September, 1880, the plaintiff and the defendant Mary were married to each other at Saratoga Springs, in this state. 3. Before the marriage between plaintiff and defendant Mary, and on the same day the plaintiff by warranty deed, a copy whereof is annexed to the complaint, forming a part thereof, conveyed to said Mary, by the name of Mary

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McMahon, a large and valuable piece of real estate situated in said county of Saratoga, described in said deed, which was recorded in the clerk's office of Saratoga county on the 30th day of September, 1880, at nine o'clock A. M., in book No. 152 of Deeds, page 219. 4. The premises so conveyed by plaintiff to defendant Mary are, with the spring thereon, very valuable, variously estimated from \$13,000 to \$100,000, and probably worth \$25,000. 5. At the time plaintiff conveyed said lands to defendant Mary he had no property beyond what he so conveyed to her, except some thirty acres lying back of the piece he so conveyed to her, which thirty acres was worth from \$1,500 to \$3,000, and not to exceed \$500 or \$600 in personal property. 6. On the 29th of September, 1880, the plaintiff was the owner of, and had been for over twenty years the owner of, and resided upon, said premises he so conveyed to defendant Mary. 7. On the said 29th day of September, 1880, defendant gave plaintiff back a lease of a life estate in the premises he so conveyed to her, which defendant Mary caused to be recorded September 30, 1880, in book No. 152, page 222, two and a half hours after the deed from plaintiff to her was recorded. 8. That on said 29th day of September, 1880, the plaintiff was nearly seventy-five years of age, having been born November 15, 1805. 9. For five or six years prior to September 29, 1880, plaintiff was physically weak and feeble, and unable to do anything except little light chores, and to sit at the spring when not too cold, and hand out the water therefrom to those visiting it. 10. For five or six years prior to September 29, 1880, plaintiff had lived alone in a small, old house upon the premises he conveyed to defendant Mary, doing his own cooking. 11. Plaintiff's former wife died some twenty-two years ago. In 1870 his only child and daughter married one Abija Comstock, and lived with plaintiff in the house on the premises he conveyed to defendant Mary until some five or six years before September 29, 1880, when she and her husband moved to the village of Ballston, some distance away, although she had, down to about September 29, 1880, visited

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him almost daily, making his bed and doing some work, and contributing by kind acts to make him and his home as comfortable as she could. 12. That plaintiff from the time he was five or six years old has been very deaf. 13. That on the 29th day of September, 1880, the plaintiff was and for many, over twenty-five years, had been a strong believer in what is commonly known as spiritualism, and believed that spirits of the dead communicated their wishes and desires, and what they knew to be for the benefit and good of the living to whom such communication from said spirits were communicated, through mediums. 14. Plaintiff claimed and believed that mediums were to be treated with the highest kind of regard, that if not obeyed something terrible would befall the person disobeying them and placed implicit confidence in what mediums said, even to the treatment of a child, which probably caused its death; such child then having a physician from which such treatment was concealed. 15. Plaintiff had for many years been in the habit of attending and had attended a great many spiritual seances, though for six or seven years, he had been so deaf he could not hear much of what was said, and had not so attended, and believed he had for the prior twenty-five years received a great many communications, through mediums, from the spirits of the departed. 16. The plaintiff in 1869 or 1870, prior to September 29, 1880, had dug upon the premises he conveyed to defendant Mary, a valuable mineral spring, commonly called the Franklin or Spiritualist spring. 17. Said spring was dug by plaintiff in consequence of, and pursuant to, what he believed to be spiritualistic communications, received by him through a medium from the spirit of Benjamin Franklin, received at many times during ten or fifteen years before he began to dig the same. It was 715 feet deep. The finding of such spring greatly increased his confidence in spiritualism and mediums. 18. Plaintiff had not seen defendant Mary until May, 1880, when she went to his spring and then made his acquaintance, claiming to be very modest and

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bashful. 19. Defendant Mary claimed to be a clairvoyant physician, and had a sign as such, at a hotel in the village of Ballston, where she was stopping. 20. The third time defendant Mary came to plaintiff's spring she informed him she was a clairvoyant physician, that she had cured a great many men of deafness, and thought she could cure plaintiff. If he would allow her to try a few times she could tell whether she could or not ; that she had cured an older man than plaintiff and made him hear perfectly well. Plaintiff consented to go to the hotel where defendant Mary was stopping and allow her to try. She manipulated his head, put her fingers into his ears and pressed them there some time ; put her hands under his jaws and held them there some time calling such acts, by her, treatment. 21. The second time plaintiff went to call upon defendant Mary for treatment, she informed him she was sure she could cure him of his deafness. That she had created an action in his head that she perceived, and she was sure she could cure him. After some negotiations as to terms she said to him, "let me get my impression," shut her eyes, sat a few moments in that manner, then opened her eyes, from which defendant understood she was communicating with the spirits to get impressions, that they would and did impress her what to do, and how much she was to charge plaintiff. 22. When she opened her eyes she said to plaintiff, I will charge you fifty dollars a month for three months, and if I cure you \$500. Plaintiff replied he couldn't give her that unless she could cure him, or unless her spirits would cure him. 23. Defendant Mary subsequently treated plaintiff in the manner hereinbefore stated for some time for twice a week for three or four weeks, finally telling plaintiff to come to Saratoga Springs, at an address she gave him, and receive treatment there. 24. The morning she directed plaintiff to come to Saratoga Springs, at about seven o'clock in the morning, defendant Mary appeared at plaintiff's house, told plaintiff that the spirits would not give her any rest at Saratoga and she had

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come. They told her she must come to Ballston, that her mission was laid out for her; she had no peace, they were tormenting her all the while; that while she was with plaintiff his influence was very congenial to her and she felt she was at home again. 25. She subsequently "treated" plaintiff several times in the manner before described. 26. Defendant Mary finally proposed that she and plaintiff should get married. Plaintiff replied that he was too old. Defendant Mary took his wrist, examined it, saying after such examination he would live twenty years and be very happy. 27. Defendant Mary then told plaintiff the spirits said they must get married within two weeks, that they, the spirits, had done a great deal for her and plaintiff; had brought them together; that they had done all they could for them to bring them together; that she and plaintiff must be married within two weeks, and that if they did not they, the spirits, would not be responsible; that something would step in between if it went over that. Plaintiff asked her what would step in between; she replied she didn't know what, but the spirits could see further than she could; that the spirits said they would have two children, a boy and a girl. She talked during all this time about the spirits, telling plaintiff she saw the spirits around him time and time again; that the spirits said she must have a part of that property, that plaintiff must give her a deed. 28. Defendant Mary told plaintiff she was from one of the first families in Ireland; that her character was as pure as the white snow; that she was so pure and honest and virtuous that nobody could say anything against her; that her father was very rich, that he owned a great deal of land there; that her father's brother was a member of parliament and she had traveled through England, Ireland and France with a rich aunt. 29. Defendant Mary, September 18, 1880, took plaintiff to Troy for the purpose of procuring a suit of clothes. 30. Plaintiff proposed to have the deed of the lands in question made at Ballston where he resided. Defendant Mary told him the lawyers at Ballston were all against her and

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they should go to Saratoga. 31. Defendant Mary objected to Mrs. Comstock, the daughter of plaintiff, hearing of their contemplated marriage, and Mrs. Comstock was not informed of it. 32. The evening before the deed in question was drawn defendant Mary arranged with plaintiff that they should next morning go separately to the cars and go to Saratoga Springs. 33. Defendant Mary took plaintiff to a lawyer with whom he was unacquainted when the deed in question was made out, she doing most of the talking relative thereto, plaintiff not hearing much of the conversation. 34. Defendant Mary told plaintiff that the spirits said he must give her the deed before they got married, and they must go and get married. 35. After the deed in question was executed defendant Mary took plaintiff to a Catholic priest, who after some conversation with her declined to marry them, when she and plaintiff went to a Baptist minister and were married. 36. Plaintiff relied upon and believed the aforesaid representations made to him by defendant Mary to be true, and that spirits of the dead communicated to him, through her as a medium, what she stated to him the spirits said, and gave her the deed in question and married her because he so believed, relying upon, and in consequence of such statements and his belief and confidence, that they were true. 37. Such belief of plaintiff was designedly, falsely and fraudulently induced by defendant Mary, by means of her relation to and influence over plaintiff as a physician, and of her falsely claiming to be a medium and to communicate to plaintiff what was said by spirits, she well knowing plaintiff believed in spiritual communications through mediums, believed she was a medium and that such statements were true, and that plaintiff believed what she said the spirits had said or directed had been communicated to him from spirits through her as a medium, and relied upon the same as true. 38. Defendant Mary herself declared plaintiff was just like a child and she could do with him as she pleased. 39. That defendant Mary obtained such deed from and married with plaintiff by means of and through

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fraud and undue influence over him, by, through and in consequence of his old age, his condition, his feebleness and his belief in spiritualism, she fraudulently taking advantage thereof to obtain such deed and to induce plaintiff to marry her. 40. Before the marriage between plaintiff and defendant Mary she informed defendant she had been twice married, that her first husband was drowned and her second had died a natural death and she had no husband living. 41. A few days after plaintiff and defendant Mary were married defendant Mary began barricading the doors and windows of plaintiff's house, claiming she was afraid someone would come and take her out. 42. During the time defendant Mary was at plaintiff's she acted very strangely, was very angry, and one night dared plaintiff to get out of bed and settle the difficulty with her on the spot. 43. Defendant Mary remained at plaintiff's house about ten days or two weeks, and then left him and his house and has not since returned, and they have not since cohabited. 44. As early as 1874, defendant Mary claimed to be and acted as a clairvoyant; was traveling about from place to place telling fortunes and acting, or claiming to act, as a clairvoyant physician, and continued so to do at various places, Troy, West Troy, Saratoga Springs, Ballston, etc., down to the time of her marriage with plaintiff. 45. As early as 1874, defendant Mary was a lewd and unchaste woman, being guilty of living and cohabiting with men who were not her husband, and of public, lewd and indecent conduct. She continued to be a lewd and unchaste woman, and to so conduct herself down to the time of the marriage between her and plaintiff. 46. In April, 1874, defendant Mary began a suit in the supreme court, in the name of Mary McMahon against one John D. Lawrence, for breach of promise to marry her, and alleged that he had seduced and had carnal connection with her; defendant Mary in her complaint in that suit alleging, "That said defendant, taking advantage of the confidence plaintiff had in him by reason of said promise and promises, seduced and cohabited with this plain-

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tiff, and plaintiff became and now is pregnant by said defendant, and was so at the time defendant abandoned her." 47. The complaint was verified by defendant Mary, April 13, 1874; answer verified May 11, 1874; judgment for defendant perfected March 29, 1874, plaintiff not appearing. 48. From about 1874 to about 1877 defendant Mary was living and cohabiting with one Laundry, as husband and wife, and sleeping with him. She subsequently stated to Lawrence she had received a telegram that Laundry had been killed, though he was, in fact, living to her knowledge, she telling a man named Bowers "he was played out." She declared to several persons she had been married to Laundry, and to some that they were married at Burnt Hills, Saratoga county. 49. Defendant Mary had a child by said Laundry. 50. About 1874, defendant Mary purchased a house and took title thereto in the name of Mary Laundry, and gave back a mortgage for a portion of the purchase-price under that name. 51. On the 26th of March, 1874, defendant Mary began a suit in justices' court by the name of Mary Laundry against Aaron Vedder, returnable April twenty-seventh, in which she personally appeared and took part, and was sworn in her own behalf under the name of Mary Laundry, and was also so sworn, in the cause named, in the county court on appeal in June, 1874. 52. Laundry had been married some twenty-nine years ago to a woman named Sophia Bell, and had never been divorced from her. 53. Said Sophia Bell was living at the time of the trial hereof. 54. That said Laundry left his wife in Michigan in 1862; returned there in 1875. That, from 1862 to 1875, said Laundry had no communication with his wife or she with him. 55. Said Alexander Laundry was living in July, 1881. 56. In the summer of 1877, defendant Mary was stopping at a house in Saratoga Springs with a man who passed by the name of Charles Hendricks, cohabiting and lodging with him as his wife, for some ten or fifteen days, and claimed to be such. Said Hendricks was alive in 1878. 57. The same summer defendant Mary was stopping at another

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house in Saratoga Springs with said Hendricks, cohabiting with him as his wife some six weeks. 58. The same summer defendant Mary was stopping at another house in Saratoga Springs with said Hendricks, cohabiting and lodging with him as his wife for about two months, and claimed to be such. 59. Said Hendricks was living in June, 1879. 60. Said Charles Hendricks real name was Frederick B. Hendricks. In 1864, said Frederick B. Hendricks was married to one Margaret Ann Riley, who was living at the time of the trial hereof. 61. At one time in the summer of 1879 defendant Mary, while ostensibly engaged in telling fortunes, had connection with a man, whose name was not shown, in a small building or hut on the Indian camping ground in the village of Saratoga Springs. 62. In the summer of 1880, while defendant Mary was at Ballston, a man named Keyes frequently visited her in her room at night and remained until late hours. 63. In 1879, defendant Mary occupied a small wooden house or hut in the Indian encampment at Saratoga Springs, telling fortunes and claiming to act as clairvoyant; on several occasions men were seen to enter her house when it was not lighted as late as twelve or one o'clock at night, remain an hour or so and come out. 64. Defendant Mary, whose name then was Mary Brady, was on the 27th day of June, 1856, married to Michael McMahon, a laborer at Schenectady in this state, by a Catholic priest. 65. In 1874, defendant Mary declared to one Lawrence that McMahon, her first husband, was dead. 66. In 1874, defendant Mary, when she knew McMahon was living, informed persons she had been married to Laundry, and she passed under that name. 67. In March, 1875, about the twenty-seventh, the said Michael McMahon was living, and said Lawrence procured his attendance at Troy, before such dismissal of said Mary's complaint, for the purpose of using him or his testimony in the suit by said Mary against him, and said McMahon went in the direction of said Mary's house the morning before such dismissal. 68. Said Michael McMahon has not been heard of since he was at Troy in March,

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1875, by Patrick Kennedy, the husband of an aunt of said McMahon, after quite extended inquiries and search in various places, nor had Frank McMahon, a son of said Michael and defendant Mary, seen him since 1871, but had heard he was at Troy in March, 1875, at the Lawrence trial, and had not heard from his father since 1875, though he had inquired of some relatives, among others an uncle residing at West Troy, an uncle residing at Cohoes and an aunt at Green Island, all within fifty miles of Ballston, and of defendant Mary, all of whom told him they thought his father was drowned in 1875 and his body found in the Hudson river. That they had heard he was drowned but knew nothing about it. Neither of said uncles nor said aunt were called as witnesses, nor was defendant Mary so called. Some persons had told Kennedy they had seen McMahon, but he was not able to find him. 68a. That at the time of the marriage between the parties defendant had no husband living. 69. No evidence was given by any one that they had any knowledge of the death of said Michael McMahon or that he had not been heard from except by said Patrick Kennedy and Frank McMahon. 70. That on the 29th day of March, 1875, defendant, John D. Lawrence, recovered a judgment in the supreme court of this state, perfected in Rensselaer county clerk's office for \$98.28 costs, of which before the commencement of this action a transcript was filed and said judgment docketed in Saratoga county October 13, 1880. 71. That plaintiff did not before the commencement of this action cohabit with defendant Mary as husband and wife, with a full knowledge of the facts constituting the fraud, and has not since the commencement hereof cohabited with her at all.

CONCLUSIONS OF LAW.

That plaintiff is entitled to judgment: 1. That the marriage between the plaintiff and the defendant Mary, solemnized on or about September 29, 1880, be annulled and dissolved. 2. That the deed and conveyance from the plaintiff to the defend-

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ant Mary, dated September 29, 1880, a copy whereof is annexed to the complaint recorded in the clerk's office of Saratoga county on the 30th day of September, 1880, in book No. 152 of Deeds, page 219, be vacated, set aside and altogether holden for naught, and that the clerk of Saratoga county enter upon the record thereof that "this deed is vacated and set aside by and pursuant to the judgment in the supreme court in the case of *Samuel Hides* agt. *Mary Hides alias McMahon*, entered in Saratoga county clerk's office on the day of , 188 ."

3. That the judgment of this court recovered against defendant Mary, by defendant Lawrence, on the 29th day of March, 1875, for \$98.28, docketed in Saratoga county clerk's office on the 13th day of October, 1880, is not a lien upon the real estate described in the deed, so directed to be vacated and set aside. 4. That plaintiff recover of defendant Mary his costs of this action.

L'Amoureux, Dake & Whalen, attorneys for plaintiff.

Edgar L. Fursman and *Nathanial C. Moak*, of counsel.

Neary & Martin, attorneys for defendant.

Charles Hughes, of counsel.

The referee wrote the following opinion :

A. Warr, *Referee*. — The plaintiff and the defendant Mary Hides intermarried in September, 1880, at Saratoga Springs, and on the same day of the marriage, but prior thereto, the plaintiff, in pursuance of an ante-nuptial agreement between them, conveyed to her by warranty deed certain real estate in Ballston Spa, the deed reciting that the same was "in consideration of the sum of one dollar and a marriage settlement between the parties hereto to him duly paid and contract of marriage carried out."

This suit was commenced in October, 1880, for the purpose of nullifying said marriage, on the grounds :

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1st. That the plaintiff's consent to said marriage was obtained by fraud.

2d. That the defendant at the time of her marriage to the plaintiff had a former husband who was then living, and that her marriage with her former husband was then in force.

The complaint also sets up that said deed of real estate was fraudulently obtained by the defendant from the plaintiff, and judgment is prayed that said deed be therefore canceled and set aside.

The allegations of fraud in the complaint are controverted by the answer. On the subject of a former marriage it is averred in the complaint, upon information and belief, that the defendant Mary was, at and prior to the time of making and receiving said conveyance, and at the time of her marriage with plaintiff, a married woman, and then had, and still has a living husband from whom she has not been divorced, and at that time was, ever has been, and still is incapable of contracting a valid marriage with plaintiff, and that said marriage of the plaintiff and the defendant Mary was and is invalid and void.

The answer contains a denial of each of these allegations by the defendant, and an allegation upon her information and belief that at the time of her marriage with the plaintiff herein her former husband was dead; and further alleges that at the time of her marriage with the plaintiff herein, the former husband of the defendant had absented himself for the space of five successive years and more, without being known to the defendant to be living during said time, although defendant during said time made constant and diligent search and inquiry for him.

Upon this question of a former marriage it was proved on the part of the plaintiff that the defendant Mary was married at Schenectady in June, 1856, to one Michael McMahon; that four children were born to them, some of whom are now living; that they lived together until about 1861, when McMahon went to the war. He returned from the war and

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was living as late as March, 1875, with relatives at and near Schenectady.

At this time defendant Mary resided at and near Troy, and though she undoubtedly knew that her husband was living within a few miles of her, she did not return to him but was living in open and notorious adultery with one Alexander Laundry, at Troy, Green Island and West Troy.

While thus living she conversed with the witness James Bowers about her husband (who was known as well by the name of "Mac" as McMahon). She said she did not care for him that he was "played out;" that when one man gave out it was good to have another, and when it was mentioned that she was not married to the man with whom she was living she did not deny it. This was in 1873 or 1874.

In the spring of 1873 she lived in a house on Green Island which she rented under the name of "Mrs. Mack," from the witness Nicholas Bulger. She described herself to him as a widow. Here she lived with Laundry, holding the apparent relation of wife to him.

During this time she claimed Laundry to be her husband although she knew her husband McMahon was living and she had not been divorced from him.

Soon after this she purchased under the name of Mary Laundry a house in West Troy of the witness John Mason, and she and Laundry lived there together, and were known to the neighbors as husband and wife. She failed to pay for the property and Mason took it back. She went to the house of Esther Perry, in Troy, and remained there two or three nights sleeping with Laundry. She declared to Mrs. Perry that Laundry was her husband, and that she had a child by him. She left Mrs. Perry's after remaining there two or three nights, but Laundry remained. She declared to David Butcher and Willard Hammond that Laundry was her husband. This was in 1874. She said she was married to Laundry at Burnt Hills, Saratoga county. In that year the defendant Mary commenced an action in the supreme court

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against one John D. Lawrence, for seduction under promise of marriage. In her complaint after alleging the promise and breach, she averred that Lawrence "taking advantage of the confidence she had in him by reason of such promise seduced and cohabited with her and that she became and then was pregnant by him," and she demanded \$5,000 for her damages. To the truth of this complaint she made oath the 29th of April, 1874.

In March, 1875, at the time fixed for the trial of that action, Michael McMahon, the husband of the defendant Mary, was produced in court, and she suffered judgment to be taken against her by default. On the morning of the trial McMahon was seen in Troy, and started to go away, but no further account of him appears from the evidence on the part of the plaintiff.

In the same year the defendant Mary again lived with Laundry as his wife, and continued to assert that he was her husband; and as late as October, 1875, she was living with him, and traded with Willard Hammond under his name. Prior to this time, on the 26th of March, 1874, the defendant Mary began a suit in justices' court by the name of Mary Laundry against Aaron Vedder, returnable April twenty-seventh, in which she personally appeared and took part, and was sworn in her own behalf under the name of Mary Laundry; and was also so sworn, in the cause named, in the county court on appeal in June, 1874.

It was proved that Laundry had been married some twenty-nine years ago to a woman named Sophia Bell, and had never been divorced from her, and that said Sophia Bell was living at the time of this trial; that Laundry left his wife in Michigan in 1862 and returned there to her in 1875; and that said Laundry was living in July, 1881. It does not appear that Laundry held, and it was admitted on the trial that he did not hold, any communication with his wife Sophia from 1862 to 1875, or she with him.

In the summer of 1877, the defendant Mary was stopping

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at a house in Saratoga Springs with a man who passed by the name of Charles Hendricks, cohabiting and lodging with him as his wife for some ten or fifteen days, and claimed to be his wife. Hendricks at the time was the proprietor and manipulator of a Punch and Judy show at the "Indian Encampment" in that village, and the defendant was engaged in the occupation of "fortune telling" at the same "Encampment."

The same summer the defendant Mary was stopping at another house in Saratoga Springs, cohabiting with Hendricks as his wife some six weeks. And the same summer she was stopping at another house in Saratoga Springs with said Hendricks, cohabiting and lodging with him as his wife for about two months, claiming to be the wife of Hendricks.

Hendricks was living in June, 1879. His real name was Frederick B. Hendricks. It was proved that in 1864 said Hendricks was married to one Margaret Ann Riley, who was sworn as a witness on the part of the defendant on this trial.

There was no further evidence given of any marriage, or any pretended marriage, of the defendant Mary with anyone, except as to her marriage with the plaintiff in this case.

If it be true that the defendant Mary married Laundry at the time and under the circumstances disclosed by the evidence in this case, as she represented and claimed she did, she was guilty of bigamy. It appears that she then knew that her lawful husband, Michael McMahon, was then living. Such marriage, if it took place as claimed by the defendant Mary, was contracted in violation of the provisions of the statute on the subject of marriage, and was absolutely void. Both Laundry and herself, under the evidence in this case, were legally precluded from entering into such a contract.

There was no ceremonial marriage between them proved, and their cohabitation in the beginning seems to have been meretricious as claimed by defendant's counsel. But they may, as the defendant Mary claimed, have entered into a contract of marriage.

Marriage with us is but a civil contract, and no ceremonial

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is necessary to create the relation. A contract of marriage made "*per verba*" *de presenti* amounts to an actual marriage, and is valid when there is no legal impediment in the way of the parties to prevent their entering into such contract. And it is competent to prove marriage by cohabitation, acknowledgment of the marriage by the parties themselves, reception of them as man and wife by their relatives and neighbors and common repute (*Ogara v. Eisenlohr*, 38 *N. Y.*, 298, *and cases cited*).

If the defendant, as she claimed, contracted marriage with Laundry she did not regard it as in the way of her entering into another contract of marriage with Lawrence while her marriage with Laundry was in full force.

Under the contract with Lawrence, and in reliance upon it, the defendant was, as she claimed, seduced and became pregnant. She was, as it appears, ready and willing to enter into the marriage relation with Lawrence at that time, and would have done so but for his refusal to carry out the contract.

Her subsequent cohabitation with Hendricks at Saratoga Springs in the character of a wife, under the circumstances detailed in the testimony, was, I think, unquestionably meretricious, and her claims and pretenses that she was his wife were untrue.

Assuming that the defendant Mary at the time was free to enter into the marriage relation with Hendricks, and in fact did so, such marriage was absolutely void, as Hendricks at the time was a married man, and his wife was then living and from whom he had not been divorced.

The plaintiff fails to establish the allegations of the complaint that the defendant Mary at the time of her marriage with the plaintiff was a married woman and had a living husband from whom she had not been divorced, and was therefore incapable of contracting a valid marriage with the plaintiff, unless it appears from the evidence that her former husband, McMahon, was living at the time of such marriage.

McMahon was in Troy in March, 1875, as a witness in the

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suit of his wife against Lawrence, and was seen there the morning before the dismissal of the complaint in that action. No further evidence was given on the part of the plaintiff as to the existence of McMahon subsequent to that time.

The witness Frank McMahon, a young man about twenty-three years of age, son of the defendant Mary, testified on her part that he last saw his father, Michael McMahon, in 1871; that he saw him then in the street in the city of Troy; that he heard of his being in Troy in 1875, and of his disappearance at that time.

This witness was not in Troy in 1875, but was absent from that city in the years 1873, 1874 and 1875, and returned there in 1876. On his return in 1876, as he testified, he made inquiries to find his father. He inquired of persons who had known his father, and of his uncles and aunt (brothers and sister of his mother), residing at Troy and West Troy, or in that vicinity. They informed him that his father was drowned in 1875, and his body had been found in Albany in the Hudson river.

His uncle informed him that his father was in Troy on a "tare," or "spree," there the last they saw of him. This witness testified that he also inquired of his mother and she told him the same story. On his cross-examination he testified that the relatives of whom he made inquiries did not say that they knew his father was drowned, but that they thought he was; that they had heard so, and heard that he was buried by the city authorities of Albany; that his aunt, who resides on Green Island, of whom he inquired in 1876, said that his father was there on a "spree," and left there to go over the river, and that was the last she ever saw or heard of him.

Patrick Kennedy, a witness sworn on the part of the plaintiff, testified, on his cross-examination, that he had resided in the town of Glenville, about four miles from the city of Schenectady, about twenty-three years; that after McMahon returned from the war he worked in Schenectady, or in that vicinity; and when out of work made it his home with the

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witness, usually in the winter time; that the witness knew of McMahon's going to Troy to attend the Lawrence trial in 1875, as a witness; he was then working for Mr. Eckrich, a farmer who lived near the witness.

At the time McMahon left to go to Troy on that occasion he left all of his clothes except those that he wore at the house of the witness. He also left some money and a bank book in charge of the witness, who still retains the same. McMahon never appeared to claim the same; and the witness has not seen or heard anything of him since that time.

The witness was an uncle of McMahon, and he and another uncle, living near there, some time after McMahon went away to Troy, as stated, made efforts at Troy and vicinity to find him, and put an advertisement in the Troy Times, and consulted the police and had them make inquiries for him, and searched for him in all the places about Troy where they thought he would be likely to be found or heard of, but got no tidings of him. Another uncle of McMahon, residing at Elmira, was at the house of the witness in July last and they spoke of the absence of McMahon, but neither of them knew anything of him since he went to Troy in 1875.

This witness subsequently made inquiries of people at different times, and some said they had seen him in Troy, and on further inquiry found it was a lie or mistake. This is substantially all of the evidence in the case upon this question. Upon this issue under the pleadings the plaintiff held the affirmative, and his relation to the question was unchanged upon the trial (*Banker* agt. *Banker*, 63 *N. Y.*, 409, 418; *Hinmon* agt. *Hood*, 62 *N. Y.*, 448, 455). The plaintiff proved that the defendant Mary intermarried with Michael McMahon, June 27, 1856, and that McMahon was alive March 27, 1875, and gave no further evidence upon the subject, reposing upon the presumption of the continuance of McMahon's life.

As a general rule the law presumes the continuance of life, and the death of neither husband or wife will be presumed

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until an absence of seven years without being heard from (*O'Gara* agt. *Eisenlohr*, 38 *N. Y.*, 301).

The defendant's counsel insist that such presumption in a case of this character is balanced by the presumption against the commission of crime and immorality, and hence that the plaintiff did not make out a *prima facie* case, demanding evidence on the part of the defendant to overcome it.

Justice PRATT, in his opinion in the case of *Clayton* agt. *Wardell* (4 *Comst.*, 240, 241), says that between these conflicting presumptions courts of justice will not decide; that the principles growing out of the presumption of innocence have been uniformly extended to all cases calling for their application. Thus, in the case of *The King* agt. *The Inhabitants of Twining* (2 *Barn. & Ald.*, 386) the same principle was applied. The case involved simply the settlement of a pauper. A woman had been married to a soldier, who soon after left for the East Indies. Within twelve months the woman married again and the question turned on the validity of the second marriage. It was held that the death of the first husband before the second marriage might be presumed and the latter was valid.

BAILEY, J., deemed it a case of conflicting presumption; the presumption of the continuance of life being balanced by the presumption against the commission of crime. The same rule has been applied in a civil action for libel where the defendant had charged the plaintiff with the crime of bigamy and attempted to justify by proving the truth of the charge (*Weimath* agt. *Harmer*, 8 *Carr & Payne*, 695).

Justice HARRIS, in his opinion in the case of *Clayton* agt. *Worden* (4 *Comst.*, 237), says that when there is a conflict of presumptions the rule is that that must yield which has the least degree of probability to sustain it. The presumption of innocence and against the commission of crime and immorality does not always prevail in the conflict (*O'Gara* agt. *Eisenlohr*, 38 *N. Y.*, 302). Presumptions of fact are but inferences drawn from other facts and circumstances in the

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case and should be made upon the common principles of induction (*Id.*, 303).

The defendant Mary was a party to two "ceremonial" marriages, one with McMahon and the other with the plaintiff. She claimed to have married Laundry at a time and under circumstances making such marriage criminal and immoral. She knew that McMahon was then living, and did not seem to regard her marriage to him as any hindrance to her marrying another man. In those days she seemed to regard the marriage relation as one of mere temporary convenience that might be assumed and discarded *ad libitum*. It may be that in this case the presumption of innocence and against the commission of crime and immorality should prevail over the presumption invoked by the plaintiff of the continuance of McMahon's life. But the defendant very properly, as I think, did not choose to leave the question to be determined upon these conflicting presumptions unaided by evidence to show the probable death of McMahon.

Assuming that the plaintiff established *prima facie* that McMahon was alive, based upon the legal presumption of the continuance of life, and that such presumption was not overcome by the conflicting presumption of innocence and against the commission of crime and immorality, it was competent for the defendant to rebut such presumption and answer such *prima facie* case by evidence from which it could be reasonably presumed that he was in fact dead prior to the marriage in question.

When there is no definite evidence of the fact of death, as in the case of a person absent and unheard of, the law receives all proper evidence of the circumstances which can throw light upon motive, cause and casualty, and in civil cases inquires not whether it is possible that he can be alive, but whether the circumstances do not warrant that strong probability of death upon which a court of justice should act (*Merritt agt. Thompson*, 1 *Hill*, 550, 555, and cases cited). It appears from the evidence that at the time McMahon was last seen alive he was

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intoxicated and was near the Hudson river at Troy. He had left his place of residence temporarily to go to Troy in obedience to a subpoena to attend as a witness on the part of the defendant, on the trial of the suit brought by his wife against Lawrence.

He had no other business calling him away, and apparently intended to return to his residence, in the vicinity of Schenectady, as soon as he was relieved from further attendance as such witness at Troy.

When subpoenaed he was at work for a farmer near the residence of Kennedy, his life-long friend and relative. He had boarded in the family of Kennedy for several winters, and made it his home there when out of work. His bank-book and his clothes were there. He took nothing away with him except the clothes he wore and a few dollars in money. He had no property except the sum of thirty-five dollars deposited in a Schenectady bank, and his wearing apparel and such money as he had with him to bear his expense when he started for Troy.

His relations with Kennedy and his family were entirely friendly and agreeable. It is strange that he did not return to his old friend Kennedy, or that he should absent himself, if living, without communicating with him and calling for his money and his clothing. His sudden and mysterious disappearance, being intoxicated when last seen alive near the river in proximity to danger, is, under the circumstances, strongly suggestive of accident and death. Some years prior to this time McMahon being drunk fell from a culvert and was badly hurt and was carried on a door to his home, then on Green Island. McMahon had not lived with his wife, nor had they had any intercourse whatever with each other, for some years before this time, though being but a few miles apart.

Whatever affection he may have had for his wife at the time of their marriage, and when they were living together in the years before he went to the war, would seem to have been entirely extinguished long before this time; and how-

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ever disagreeable it may have been for him to have obeyed the requirements of a subpoena to attend a trial in which his wife claimed to have been seduced under a promise of marriage to another man and to be pregnant from her illicit intercourse with her alleged seducer, it is not probable that he was so affected by the circumstances as to commit suicide. And there is nothing in the circumstances connected with McMahon, as shown by the evidence, from which it may reasonably be inferred that he came to his death by suicide. Being habitually addicted to the use of ardent spirits he would be very likely to do as he did, indulge intemperately in their use on that occasion and become intoxicated.

The unavailing inquiries and search that was made for him by his friend Kennedy soon after his disappearance and subsequently. The fact that he has not been heard of since by those who would have been likely to have heard of him if alive. The repute and belief among his friends and relatives that he is dead, and the circumstances surrounding McMahon and connected with his departure and disappearance warrant in my opinion that strong probability of his death upon which a court of justice should act. The rumor which was credited among his friends and relatives soon after his sudden disappearance that he was at that time drowned in the Hudson river, was, I think, probably well founded. Upon the whole evidence in the case bearing upon the question it does not appear that McMahon was alive at the time of the marriage of the defendant Mary with the plaintiff. There was no evidence that she knew or believed McMahon to be living at that time. But on the contrary, I am satisfied from the evidence that he was in fact dead prior to that time, and that the defendant Mary fully believed when she married the plaintiff that her former husband, McMahon, was dead.

It remains to be determined whether the plaintiff is entitled to the relief prayed for, on the grounds set forth in the amended complaint involving fraud.

It is alleged therein: 1st. That on the 29th day of Sep

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tember, 1880, the plaintiff and defendant Mary intermarried at Saratoga Springs. 2d. That prior to said marriage, as an inducement thereto and as the basis thereof, the defendant Mary stated and represented that she was a pure and virtuous woman, with a character unblemished and above reproach. 3d. That the spirits had commanded her or directed her, she being a medium, to inform the plaintiff that the spirits had commanded and directed her and the plaintiff to marry each other; and had commanded the plaintiff to convey to her the real estate specified in the complaint. 4th. That the plaintiff relied and acted upon said statements, and believed the same to be true; and he, the plaintiff, had no knowledge or information to the contrary when he intermarried as above stated. 5th. That before said marriage and on the same day the plaintiff, in consideration of said marriage and of said representation and statements by the defendant Mary, by warranty deed, duly executed and delivered, did convey to said defendant Mary, by the name of Mary McMahon, a large and valuable quantity of real estate, a copy of which deed is annexed to the complaint and is a part thereof. 6th. That the defendant Mary represented herself as a spiritual physician, and for some time before said marriage pretended to doctor plaintiff for deafness under the direction of spirits. 7th. That plaintiff is upwards of seventy-four years of age, and for years last past has been feeble and infirm in health; and for many years has been a believer in what is commonly known as spiritualism; and believed that spirits of the dead communicated their wishes and desires, and what they knew to be for the benefit and good of the living, to whom such communications from said spirits were communicated through mediums. 8th. That plaintiff married defendant Mary, and transferred such real estate to her in consequence of her representations to him as aforesaid, and believing the same to be true; whereas, in truth and in fact, the same were false and untrue. 9th. That the real estate so conveyed was, and is of the value of \$20,000, and embraced nearly all the property the plaintiff

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then owned or possessed. 10th. That at the time of said marriage the defendant Mary was a lewd, unchaste and impure woman, of ill-repute and bad character. 11th. That the plaintiff was induced to, and did marry the defendant Mary, and conveyed to her said real estate, relying solely upon her said representations. 12th. That all of said representations were and are false, and were known by defendant Mary to be false when made.

After a careful consideration of all of the evidence in the case in regard thereto, I am satisfied that each of the foregoing allegations of the complaint is substantially proved.

The defendant Mary was present on the trial at some of the hearings and was at liberty to take the stand as a witness and give her version of the way, the courtship, or *modus operandi*, by which her marriage to this old man and the deed of real estate from him to her was brought about and obtained. But she was not called as a witness and the testimony of the plaintiff is uncontradicted. In her answer, which is verified by her oath, she denies specially the several allegations of the complaint on the subject.

And she further denies, in the answer, that she was at the time of her marriage with said plaintiff, *or for any time previous thereto*, had been a lewd, unchaste or impure woman, or of ill repute or of bad character.

When she verified the answer she knew that denial was untrue. If at the time of her marriage with the plaintiff and shortly prior thereto, when she represented to him that she was virtuous and pure "as the white snow," she was not then in fact unchaste and impure, there had been a renewal and change in her character extraordinarily sudden and remarkable. Such "new birth" in the light of the evidence beggars belief. This defendant further answering the complaint denies that all or any of the alleged representations therein set forth were or are false, excepting only the alleged representations that she, the defendant, was a spiritual physician and that spirits had commanded her and directed her, she being a medium, to

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inform the plaintiff that the spirits had commanded and directed her and the plaintiff to marry each other, and had commanded the plaintiff to convey the real estate specified in the complaint to her, and as to the said alleged representations the defendant denies that she made the same. *"And upon her information and belief, alleges that all times prior to the time mentioned in the amended complaint at that time, and ever since the spirits, if any, were and are otherwise occupied than in interfering with or directing mundane transactions concerning either matrimony or real estate."*

The uncontradicted evidence shows that she did in fact make such representations, and the foregoing allegations of her sworn answer, shows that according to her information and belief those representations so made by her were false. She had practiced as a "clairvoyant physician" and "fortune-teller" for years, but it is not claimed in her answer and does not appear from the evidence that at any time except in her ante-nuptial "treatment" of and interviews with the plaintiff that she assumed to be a spiritual medium, or pretended to have any faith in "spiritualism."

So far as she was informed and believed, the spirits, "if any," have always been otherwise occupied "than in interfering with or directing mundane transactions concerning either *matrimony or real estate.*"

This defendant alleges in her answer as a separate defense, upon her information and belief, that subsequent to the intermarriage of the plaintiff and the defendant, and before the commencement of this action the plaintiff voluntarily cohabited with this defendant as her husband, with a full knowledge of the facts constituting the fraud, if any, alleged in the amended complaint.

There is an entire failure of proof to sustain this defense. The evidence shows otherwise. This old man was circumvented and entrapped into this marriage, and his consent thereto obtained by the false and fraudulent representations and devices of the defendant referred to. But, nevertheless,

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it is strenuously insisted by the defendant's counsel that such a case as this is not within the purview of the statute, providing that an action may be maintained to procure a judgment declaring a marriage contract void, and annulling the marriage when the consent of one of the parties was obtained by fraud, and that the equity power of the court, independent of the statute, is inadequate to relieve the plaintiff from a contract of marriage thus obtained.

In *Griffin agt. Griffin* (47 N. Y., 138), it is said, by justice RAPALLO, that the court of chancery of this state has in some cases entertained bills to declare the nullity of marriages, independently of any statute conferring jurisdiction. But these were cases in which the marriage was sought to be declared void for some cause for which chancery had power to cancel or avoid all contracts, such as lunacy or *fraud*, and it was held that the marriage contract was not excepted from the operation of this general jurisdiction; and that if it was not exercised by the court of chancery in England in matrimonial cases, it was not for want of jurisdiction, but because other tribunals existed there competent to afford full relief. But in all other cases it must be conceded that the jurisdiction of the court of chancery of this State in actions for divorce, either on the ground of nullity or for cause arising subsequent to the marriage, is founded wholly upon the statutes (*Perry agt. Perry*, 2 *Paige*, 506; *Burtis agt. Burtis*, *Hopk. Ch.*, 550). Prior to 1787 there was no tribunal in this state authorized to grant a divorce, and the only remedy of aggrieved individuals in matrimonial cases was by application to the legislature for relief.

In 1787 an act was passed reciting that it was more advisable for the legislature to make general provisions for such cases than to afford relief to individuals without a proper trial, and, therefore, conferring jurisdiction upon the court of chancery to decree divorces in cases of adultery. This was the only cause of divorce until the year 1818, when divorces, on the application of the wife, on the ground of cruel treat-

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ment was authorized, and in 1824 the husband was enabled to sue for divorce on the same ground.

In 1820, in *Weightman* agt. *Weightman* (4 *Johns. Ch.*, 343), chancellor KENT decreed the nullity of a marriage on the ground of lunacy of one of the parties at the time of its alleged solemnization; and in 1825, in *Terlat* agt. *Gojou* (*Hopk. Ch. R.*, 478), chancellor SANFORD decreed a marriage void for fraud. Both of these cases were based upon the general jurisdiction of the court of chancery in cases of lunacy and fraud and not upon the jurisdiction of ecclesiastical courts. Accordingly, in *Burtis* agt. *Burtis* (*Hopk. Ch.*, 557), decided also in 1825, chancellor SANFORD decided that the court of chancery had no jurisdiction to annul a marriage on the ground of impotence, holding that the statutes of this state, before referred to, are founded upon the supposition that the causes of divorce which they define were not causes of divorce by any pre-existing law in force in this state, and that they could not be regarded as an adoption of the English ecclesiastical law on the subject of divorce, but as conferring power only in the cases which they specify. By the Revised Statutes the power of the court of chancery on the subject of divorces was enlarged.

Article 2 of title 1, chapter 8, part 3, entitled "of divorces on the ground of the nullity of the marriage contract," enumerates five causes, for which, if they existed at the time of the marriage, the chancellor may declare void the marriage contract, viz.: 1st. Either of the parties not having obtained the age of legal consent. 2d. Either of them having a former husband or wife living. 3d. One of them being an idiot or lunatic. 4th. Consent having been obtained by fraud. 5th. Physical incapacity of either party. Some of the cases here enumerated were causes which rendered the marriage void at common law, and on which the court of chancery had already assumed jurisdiction. Other new causes not formerly cognizable in chancery.

The section was framed, as appears by the revised notes,

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in view of the decisions in *Weightman* agt. *Weightman* (4 Johns. Ch., 343) and *Burtis* agt. *Burtis* (Hopk., 557), and the revisers refer to the latter case as establishing that the whole jurisdiction of the court of chancery in relation to marriage (*except when the contract is void on the same grounds on which other contracts may be avoided*) is conferred and limited by statute, and they criticise as extra judicial the remarks of chancellor KENT in *Weightman* agt. *Weightman* as to the power of the court of chancery to annul incestuous marriages, and refer to the fact that up to the time of the revision of the statutes there was no law of this state defining or prohibiting incestuous marriages. From this review it will be seen that in some actions for nullity the jurisdiction of chancery was derived wholly from the statutes.

Yet in others it existed independently of the statutes and as a part of the original jurisdiction of the court. By the constitution of 1846, the jurisdiction formerly rested in the court of chancery became vested in the supreme court.

If there be any doubt of the power of the supreme court in the exercise of equity jurisdiction, independent of statute, to adjudge a marriage contract void obtained by fraud, the power to so adjudge is expressly conferred upon the court by statute re-enacted in the Code (*Sec. 1743*).

The plaintiff should have judgment declaring the marriage in question void, and annulling the same if it is established by the evidence that his consent to the marriage was obtained by fraud.

All marriages procured by force or fraud or involving palpable error are void, for here the element of *mutual consent* is wanting so essential to every contract.

The law treats a matrimonial union of this kind as absolutely void *ab initio*, and permits its validity to be questioned in any court at the option, however, of the injured party, who may elect to abide by the consequences when left free to give or withhold assent. Force implies a physical restraint of the will; *fraud, some deception practiced whereby an unnatural*

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state of the will is brought about (Schouler on Husband and Wife, sec. 27). Lord HARDRICKE in his enumeration of frauds for which equity will grant relief (2 Ves., 155) says: "First fraud, *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case."

An actual or positive fraud is the intentional and successful employment of any cunning, deception or artifice used to circumvent, cheat or deceive another (1 Story Eq. Jur., sec. 186).

Story, in his "Equity Jurisprudence" (vol. 1, sec. 222), says: The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests, is that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason accompanied with deliberation, the mind weighing as in a balance the good and evil on each side.

And, therefore, it has been well remarked by an able commentator upon the law of nature and nations that every true consent supposes three things: First. A physical power. Secondly. A moral power; and, Thirdly. A serious and free use of them. And Crotius has added: That what is not done with a deliberate mind does not come under the class of perfect obligations, and hence it is that if consent is obtained by meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind.

For although the law will not generally examine into the wisdom or prudence of men in disposing of their property or in binding themselves by contracts or other acts, yet it will not suffer them to be entrapped by the fraudulent contrivances or cunning or deceitful management of those who purposely mislead them.

The concealment by defendant before her marriage of her previous unchaste character, or the false representations made by her inducing the plaintiff to believe her chaste, are not, it seems, such a fraud as will support a judgment declaring a marriage void.

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It was so held in the supreme court of Wisconsin in a recent case under a statute similar to ours (*Varney* agt. *Varney*, 23 *Alb. Law Jour.*). It was so held in Massachusetts (*Reynolds* agt. *Reynolds*, 3 *Allen*, 605).

This doctrine seems to have been uniformly sustained by the courts whenever the question has been raised (*See cases cited by judge TAYLOR, in Varney* agt. *Varney*).

Justice BIGLEOW, in *Reynolds* agt. *Reynolds* (3 *Allen*, 605), says: "While marriage by our law is regarded as a purely civil contract, which may well be avoided and set aside on the ground of fraud, it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although received by disingenous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage.

"In the absense of force or duress and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party is deemed wholly immaterial and furnishes no good cause of divorce. Therefore no misconception as to the *character, fortune, health* or *temper*, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities which do not constitute the essential material elements on which the marriage relation rests.

"The great object of marriage in a civilized and christian community is to secure the existence and permanence of the family relation and to insure the legitimacy of offspring."

Bishop, in his work on Marriages and Divorce, concurs fully in this view (*Id.*, sec. 168), and holds "that the nature of the marriage contract forbids its validity to rest upon any stipulations concerning these accidental qualities.

In *Klein* agt. *Wolsohn* (1 *Abb. New Cases*), it was held that a divorce cannot be granted for the husband's fraud in inducing the marriage by false representations as to his

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character and property. In that case the plaintiff alleged that she was induced to consent to her marriage by certain representations made to her by the defendant which she believed at the time of her marriage to be true.

The representations were that he was a man of good character, and was worth \$15,000, and from his income he could support himself and plaintiff. Whereas, in fact, he was a man of bad character and was not worth the amount he claimed, and had no property or means. That upon discovering the falsehood of the statements she refused to live with him. The court held that the fraud for which a court of equity would be justified in decreeing a dissolution of the marriage contract was clearly not of that character. And that the marriage is not to be annulled upon every ground of false representation which was sufficient to cancel an ordinary contract.

Following the doctrine of the authorities cited, I must hold that the representations of the defendant as to her chastity and purity, her pedigree, condition in life and personal qualities however false, are immaterial. If the plaintiff's claims for relief rested solely upon such a foundation it could not be sustained. That would not constitute fraud within the meaning of the state, and however improvident and unhappy such a marriage might be, the law would hold the aggrieved party to the contract thus obtained. But the claim for relief in this case, as I view it, stands upon other and more substantial grounds. The evidence shows that the defendant was unable to obtain and did not obtain the consent of the plaintiff to the marriage and the deed of the property, which she coveted, by means of such false pretenses alone.

It was not because the defendant induced the plaintiff to believe that she was a virtuous and honest woman and of unblemished reputation and possessed the attributes of a spiritual medium that the plaintiff consented to the contract. It was by means of the false and fraudulent representations of the defendant that through her, as such medium, the spirits had

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commanded and directed their marriage, and had commanded the plaintiff to convey to her the real estate, that the plaintiff's consent to such marriage and conveyance of property was obtained. That was the determining cause of the contract. Without the aid of that artifice it is evident that the plaintiff would not have yielded to the overtures of the defendant. She undoubtedly knew of his strong belief in and reliance upon so-called spiritual communications, as it was a matter of common notoriety at Ballston Spa. She was no novice. She had had much experience as a "fortune-teller" and otherwise, and availing herself of her cunning and craft she took undue advantage of the plaintiff's religious belief, and by the false representations alluded to entrapped and controlled him. This, as I regard it, was an atrocious fraud, and the case as to the marriage contract is fully within the meaning of the statute, and is a case in which the benign jurisdiction of the court can be successfully invoked for the relief demanded in the complaint.

The deed should also be canceled, as it is not merely tainted with but was steeped in the same fraud by which the marriage contract was obtained. A deed given in consideration of a marriage procured by fraud and the execution of which was obtained by the devices practiced by the defendant in this case cannot well be said to have been given for a meritorious consideration.

I cannot agree with counsel for defendant that as the marriage was the consideration of the deed and the parties were in fact married and cohabited together, and the plaintiff cannot return or pay back what he has received or enjoyed, the deed must therefore stand.

It is not claimed that the defendant became pregnant by such cohabitation or suffered any special injury therefrom. By the dissolution of the marriage contract the defendant is substantially restored to the same condition in which she was before the marriage. And that will suffice in a case of this character.

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The law cares very little what the loss of the fraudulent party may be, and it only requires the injured party, as far as he can, to undo what had been done in the execution of the contract. "This is all the defrauded party can do and all that honesty and fair dealing require of him. If this fail to extricate the wrong-doer from the position that he has assumed, it is in no sense the fault of his intended victim, and upon the principles of eternal justice whatever consequences may follow should rest on the head of the offender alone" (*Per BEARDSLEY, J., Mason agt. Bovett, 1 Denio, 69; approved by court of appeals, Hammond agt. Pennock, 61 N. Y., 145, 153*).

There should be judgment for the plaintiff annulling the marriage and canceling the deed in question.

A motion was made at Schenectady special term held by LANDON, J., for confirmation of the report so far as it directed that the marriage between the parties be annulled. It was so confirmed, Mr. justice LANDON writing the following opinion :

LANDON, J. — Motion for judgment to annul the marriage between the parties. It clearly appears by the evidence upon which the referee bases his report, that the plaintiff's consent to this marriage was obtained by fraud. He was seventy-four years of age, and for many years had been a believer in the fact and the authority of spiritualistic communications made to himself through the agency of alleged mediums.

Important events in his own experience had occurred, as he believed, through such influence, and these had strengthened and confirmed his belief. The defendant, whose character as disclosed by the evidence was infamous, sought and made his acquaintance in the assumed character of a clairvoyant physician and spiritual medium. She soon gained his confidence, and then she represented to him that the spirits had laid out her mission for her ; that they had brought the plaintiff and herself together ; that they must be married within two weeks, and if they did not marry within that time

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the spirits would not be responsible, but something mysterious would happen ; what, she did not know, but the spirits did ; that she saw the spirits around him time and time again, and they said he must give her a deed of a part of his farm. By such methods she subjected his will to her own and he gave her the deed she requested of property valued at \$25,000 and on the same day married her. He soon discovered the fraud when his cohabitation with her ceased, and this action was commenced. His consent was given under the delusion that the authority which he held in the highest awe and reverence commanded him to give it, and would be gravely offended if he did not. She created that delusion by falsely representing that the spirits gave the command. That his mind was predisposed by the faith of many years to a readiness of belief in the truth of such representations made him, it is true, the more easily a dupe and a victim, but it does not make the grossness of the deception less nor accord to the imposter any protection.

It may be that a person of ordinary prudence would not have been deceived by such representations, but the law does not out-law from its protection the old, the weak and the infirm.

A pretense, says Mr. Bishop (2 *Cr. L.*, *secs.* 432, 436), calculated to mislead a weak mind, if practiced on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind if practiced upon it.

Besides, ordinary prudence is a flexible term and we cannot say that any other person of average capacity would not, under similar circumstances, have been deceived by such representations provided his spiritual or religious belief was of the same kind and intensity as the plaintiff's. Our law prescribes no religion, but tolerates all and condemns none, and therefore the plaintiff's case suffers no detriment because his religious belief exposed him to the arts of the defendant.

The Code of Civil Procedure (*sec.* 1750) authorizes an action to annul a marriage on the ground that the consent of one of

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the parties thereto was obtained by fraud, provided the parties have not voluntarily cohabited as husband and wife after discovery of the fraud. This is but a formulated expression of the equity power of the courts. The cases in our own courts show that the fraud which will lead the court to annul a marriage must be such as shocks the sense of fairness and is successful by its very audacity and baseness (*Scott agt. Shufelt*, 5 *Paige*, 43; *Ferlot agt. Gojon*, *Hopk.*, 478; *Sloan agt. Kane*, 10 *How.*, 66; *Clarke agt. Clarke*, 11 *Abb. Pr.*, 228; *Klein agt. Wolf-solm*, 1 *Abb. N. C.*, 134).

Tested by this stringent rule, I think this marriage should be annulled. Because of the same fraud the deed should be set aside. The report is confirmed, the facts found by the referee approved, and judgment, as advised by him, directed.

SUPREME COURT.

WILLIAM E. LEAVITT, as executor of the last will and testament of **GARDINER H. WOLCOTT**, deceased, agt. **FREDERICK H. WOLCOTT** and others.

Will — Construction of trusts — Where there are several trusts, one or more of which are valid and the other void, the invalid portion may be dropped and the valid ones be executed.

The testator in his will directed that one-half the interest from his residuary estate should be paid to A. during life, and one-half to B. during life. On the death of A., his share the testator directed should be divided between C., D. and E., share and share alike, for life; and that upon the death of B. her share of the income should also be divided between C., D. and E. for life. The testator directed that at the death of all these beneficiaries the estate should be given to F., if of age, and if he should be a minor, that it be held in trust for him until he arrived at his majority:

Held, that though taken as a whole, the testator's disposition of his estate transgresses the statutes against perpetuities, yet, the several bequests of income being independent and stated separately, the invalid portion may be dropped and the residue be allowed to stand. The provisions

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for A. and B. are valid, and though there may be some doubt as to that for C., D. and E., yet, as upon the death of either, his or her share does not go to the survivors, there is no illegal suspension of the power of alienation. The provision for F. is void, and after the termination of the interests in favor of A., B., C., D. and E., the testator died intestate.

Where an estate is vested in trustees upon several trusts, one or more of which is valid and another void, the latter will be rejected, and the estate of the trustees upheld to the extent necessary to enable them to execute the valid trusts, provided they are separable.

First Department, General Term, January, 1883.

Before DAVIS, P. J., DANIELS and MACOMBER, JJ.

APPEAL from judgment of the special term construing the will of Gardiner H. Wolcott.

The following is the opinion of the special term :

VAN VORST, J.— The last will and testament of Gardiner H. Wolcott is presented for construction. The provisions thereof, concerning which questions have arisen, may be shortly stated.

Deducting from his property certain legacies and specific gifts, the testator provides that one-half the legal interest from his estate, which he directed should be converted into bonds and mortgages, should be paid to his father during life, and that the other half of the interest should be paid to Mrs. Charlotte Varian during her life.

On the death of his father, the testator directed that his share of the interest should be divided between his brother Frederick and his sisters Elizabeth and Alice, share and share alike, for life. And that upon the death of Mrs. Varian her share of the income should, in like manner, be divided between the same brother and sisters for life.

The will then provides that “at the death of the above named parties — my father, Mrs. Charlotte Varian, my brother Frederick and sisters Elizabeth and Alice — I wish the entire estate, held in trust by my hereinafter named trustees and executors, to be paid to my dear nephew, Huntington Wolcott Merchant, if of age ; if at such time he should be a

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minor, the property will be held in trust for him until he arrives at his majority."

Taken as a whole, this disposition made by the testator of his estate transgresses the statutes against perpetuities, as it suspends the power of alienation beyond two lives in being at the testator's death.

But I apprehend that the invalid portion may be dropped, and that the residue may, without violence, be allowed to stand. I am persuaded that the several bequests of income are independent. The trust in favor of the father of the testator and Mrs. Varian is one; that in favor of the brother and sisters of the testator is another, and the possible trust in favor of Huntington Wolcott Merchant is a third. It is true they are not numbered in the will, but they are stated separately and distinctly apart. There is no valid reason for condemning an entire trust, when portions may be separated and disfavored, because contrary to the statute. The valid portions of a trust and dispositions made in a will should be allowed to stand, if it can be done without disrupting the whole scheme of the will or trust. And where an estate is vested in trustees upon several independent trusts, one or more of which is valid and the other void, the latter will be rejected, and the estate of the trustees will be upheld to the extent necessary to enable them to execute the valid trusts. (*Savage* agt. *Burnham*, 17 *N. Y.*, 561; *Van Schryver* agt. *Mulford*, 59 *N. Y.*, 426; *Harrison* agt. *Harrison*, 36 *N. Y.*, 543).

As far as the interest for life in favor of the testator's father and Mrs. Varian is concerned there can be no possible objection to the will. There is some doubt, however, about the provision in favor of the brother and sisters of the testator, as in one view the principal is tied up for three lives. But the will contains words of severance. They are to receive the income "share and share alike for life." Upon the death of either, his or her share of income does not go to the survivors. But, upon reflection, I think that under the case of *Monarque* agt. *Monarque* (80 *N. Y.*, 320) this works no illegal suspen-

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sion of the power of alienation beyond the time limited by statute. I am unable to distinguish the present case in this regard from the one cited.

The real difficulty arises with respect to the possible continuance of the trust during the minority of Huntington Wolcott Merchant, which would carry the suspension beyond two lives. The last disposition must therefore be adjudged invalid, but the other parts of the will should be allowed to stand as valid in law and equity.

The result is that after the terminations of the interests in favor of the father of the testator and Mr. Varian and his brother and sisters, the testator died intestate.

The learned counsel for the defendant Frederick H. Wolcott has submitted an elaborate and carefully prepared brief, which I have read with interest, but I cannot accept the conclusion which he has reached, that the whole scheme of the will, in so far as provision for the above named person is made, must fail. Nor can I accept his view that the invalidity of all the trusts is *res adjudicata* through the decision in the partition suit at special term. The subject was before the judge at special term incidentally and not directly, as it is here, upon a bill for the construction of the will.

The attorneys for the plaintiff must prepare findings of fact and conclusions of law and a judgment in pursuance of the above, and serve a copy thereof on the attorneys for the other parties and notice of settlement of two days.

D. A. Hawkins, for appellant.

J. M. Varnum, for respondent.

E. C. Delavan, for defendant Varian.

DAVIS, *P. J.* — The will of the testator converts all his property, with certain specific exceptions otherwise disposed of, into first class bonds and mortgages on New York city real estate. The trust created relates to the property so con-

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verted, and is therefore a trust of personal property with which the statute of uses and trusts in lands has nothing to do (*Payne* agt. *Gott*, 24 *Wend.*, 641; *Savage* agt. *Burnham*, 17 *N. Y.*, 561).

After giving a specific legacy of \$1,000, the scheme of the will puts the residue of the property into the hands of the persons named as trustees and executors upon certain specified trusts; the first of which is to pay half the legal interest to the father of the testator so long as he lives; the second, to pay half such legal interest or income to Mrs. Charlotte Varian so long as she may live. These are several and separate trusts, so intended and clearly so treated by the will. The same separation into several trusts is continued by the will after the death of these respective beneficiaries. On the death of the father the will directs that his share of the income shall be divided between his brother Frederick and his sisters and Alice, share and share alike for life. On the death of Mrs. Varian, the will directs that her share of income shall be divided between the same persons, share and share alike for life. The share of the income given to the father is that derived from one-half of the property placed in trust. But on his decease that one-half is divided into three shares respectively, the income of which is to be paid to the new beneficiaries share and share alike. The effect of this provision is to create three separate and distinct trusts for the benefit of the brother and the two sisters of the testator. There is no provision for survivorship in respect to these shares, and no joint tenancy therein is created. Each takes in severalty and has no interest whatever in the question whether the trust in favor of either of the others is or is not executed. The legal effect of the scheme is, therefore, to create a life estate in one-half income of the property in favor of the father so long as he may live, and on his death to divide the same into three equal separate shares, in each of which a life estate is given to three distinct persons. If the will stopped there there would, we think, be no question as to the validity of the disposition of the estate,

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for no portion of the father's share would be tied up beyond two lives in being; and the same remark is applicable to the trust created for the use of Mrs. Varian. If no other disposition were made, the law upon the death of the brother or of either sister would step in to take care of his or her share under the distribution laws of the state. But a further disposition of the trust is made which the court below held to be invalid. That disposition is in these words:

"At the death of the above named parties, my father, Mrs. Charlotte Varian, my brother Frederick and sisters Elizabeth and Alice, I wish the entire estate held in trust by my hereinafter named trustees and executors to be paid to my dear nephew Huntington Wolcott Merchant, if of age; if at such time he should be a minor the property will be held in trust for him until he arrives at his majority."

By the language of this provision a contingent trust is created in favor of the nephew in all the residue of the estate, and it is not to become operative until after the death of all the previous beneficiaries, five in number, and the effect of the provision is to suspend the absolute power of alienation of the property covered by it until the decease of these five persons, and, also, in case the nephew be not then of age until he shall attain his majority. The court below was, therefore, right in holding the trust for the nephew to be in violation of the statute. But it does not necessarily follow under the more modern authorities of this state that the antecedent trusts are for that reason void. To have that effect it must appear that the invalid trust is by the scheme of the will so far interwoven with those which preceded it that the intention of the testator could not be carried out in respect of either of the trusts, if the one in favor of the nephew be dropped. It is now the settled rule of this state that where an estate is vested in trustees upon several trusts, one or more of which is valid and another void, the latter will be rejected, and the estate of the trustees upheld to the extent necessary to enable them to execute the valid trust (*Savage agt. Burnham*, 17 N.

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Y., 561; *Van Schryver* agt. *Mulford*, 59 *N. Y.*, 520; *Harrison* agt. *Harrison*, 36 *N. Y.*, 543; *Monarque* agt. *Monarque*, 80 *N. Y.*, 320).

Applying this rule to the case, the invalidity of the last trust is not to be allowed to affect those which precede it, in case the trusts are separable within the rule of the authorities cited. We concur with the learned judge below that they are of that character.

It is argued with much force and ingenuity that under these several trusts, commencing upon the death of the father and the death of Mrs. Varian, the brother and the two sisters take a joint interest in the whole fund and that upon the decease of either one, the surviving two take his or her share, and upon the death of two, the last survivor takes the whole interest for life. But the language does not warrant that construction. It expressly directs that the interest of the father and of Mrs. Varian upon their respective deaths shall be divided between Frederick, Elizabeth and Alice, share and share alike for life, and no words are used which, by necessary import, would create any interest by survivorship.

The argument, however, receives some support from the fact that the trust in favor of the nephew does not become operative by the language of the provisions until the death of all the preceding beneficiaries. This is supposed to have some effect in the consideration of the question whether the interest taken by the brothers and sisters is not a joint instead of a several one. This is answered, however, by the fact that the trustees being vested with the whole residuary estate for the purpose of the several trusts, upon the termination of each separate trust in favor of the brother and the sisters, must continue to hold his or her separate interest for the benefit of the last trust in favor of the nephew as a part of the trust fund to be affected whenever that second trust in favor of each brother or sister terminates by his or her death. The fund would remain if the last trusts were valid in the hands of the trustees to await its operation.

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Some of the numerous authorities cited by the learned counsel for the appellant would seem to require the construction that the trust in favor of the brothers and sisters are joint and not several, but we think they should not be held to overcome the force of language used, which by us must be held to indicate the testator's intent. This intent is to control the character of each of the trusts, and it seems clear that he designed that neither brother or sister should take more than one-third of the interest given to the father or to Mrs. Varian. No other construction completely satisfies the language used. It is altogether improbable that he intended instead of creating a joint tenancy with survivorship that the trust in favor of the nephew should become operative *pro tanto* upon the death of either of the brothers or sisters. Without examining the authorities in detail, we need only add that in our opinion, so far as they are in conflict with the authorities of this state already referred to, they must be regarded as overruled.

We have intended to do nothing more by this opinion than simply to indicate the ground upon which we put our decision, which is, in substance those indicated by the opinion of the court below.

The judgment should be affirmed, with costs of all the parties to be paid out of the fund.

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COURT OF APPEALS.

THE PEOPLE agt. JOHN PETREA.

Constitutional law — Construction of the amendments to the constitution adopted in 1874 with reference to local legislation — Chapter 532, Laws of 1881, amending section 1041 of the Code of Civil Procedure, in so far as it provided for the selection of grand jurors in and for the city and county of Albany, is unconstitutional — But that part of the act which relates to the selection of petit jurors is constitutional — Practice as to drawing grand and petit jurors — Code of Criminal Procedure, sections 828, 239, 312, 313, 321, 332, 293, 362, 285.

Section 18 of article 3 of the Constitution (as amended in 1874) provides that the legislature shall not pass a private or local bill in certain enumerated cases. Section 25 of same article declares that said section 18 shall not apply to any bill, or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes:

Held, that the legislature cannot pass a local bill in any one of the enumerated cases unless reported to it by the commissioners to revise the statutes.

Whenever a question arises as to the constitutionality of a statute the courts may resort to any source of information which in its nature is original evidence of any fact relevant to the inquiry, but the motives of the legislature in passing a particular statute is irrelevant.

The journals of each branch of the legislature and the original act are competent evidence upon the issue whether a particular law has been constitutionally passed.

An amendment of an existing local law regulating the selection of petit jurors which simply transferred the power of selection from one local officer, or set of officers, to another local officer is constitutional.

In this case the defendant was indicted for a felony by a grand jury which was drawn from names selected under an unconstitutional law, and objection on that ground was taken by him before plea of not guilty:

Held, that such grand jury was a *de facto* one, and the invalidity of the law affected none of his substantial rights, and therefore there was no violation of the constitutional guaranty (*art. 7, sec. 10*) that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury.

If a defect in the organization of a grand jury is such as to deprive it of its character as a grand jury in a constitutional sense, the court is bound to take notice of the defect, although no statute authorized it, or even

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if a statute assumed to preclude the raising of the objection. But when the defect is not of that character the question is one of procedure merely, subject to regulation by the legislature.

The Code of Criminal Procedure provides no way whereby a defendant can make the objection to a grand jury, that it was drawn from names selected pursuant to the provisions of an unconstitutional law.

The Code of Criminal Procedure controls as to every indictment found after it went into effect, whether the crime charged was committed before or after that time (*Affirming S. C.*, 64 *How.*, 139).

APPEAL from judgment of general term of the supreme court, third department, affirming a conviction in the court of sessions of Albany county. The case at general term is fully reported (64 *How. Pr. R.*, 139).

The facts are sufficiently stated in the opinion.

Nathan P. Hinman and *Edward J. Meegan*, for defendant, appellant.

D. Cady Herrick, district-attorney, for people, respondents.

ANDREWS, J. — The defendant was indicted at the September term of the Albany county sessions, 1881, for the crime of grand larceny committed on the 2d day of August, 1881. He was arraigned at the March term, 1882, and on his arraignment filed a special plea setting forth in substance that the grand jury which found the indictment was not a legal grand jury for the reason that it was not drawn from any list of grand jurors selected by the supervisors of Albany county, but from a list of petit jurors pursuant to chapter 532 of the Laws of 1881, which act is alleged in the plea to be unconstitutional, in that it is a local act for selecting and drawing grand jurors in the city and county of Albany, and was not reported to the legislature by commissioners appointed to revise the statutes, and was passed in contravention of article 3, section 13 of the Constitution adopted in 1874, which forbids the passing by the legislature of a private or local bill in certain enumerated cases, and among others for "selecting, drawing summoning or impanneling grand or petit jurors."

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The defendant accompanied his plea with an offer to prove the facts stated in the plea, and especially to prove by the clerk of the senate, by the commissioners appointed to revise the statutes, by the journal of the legislature of 1881, and by the original act itself that the act was not reported to the legislature by any commissioner or commissioners appointed to revise the statutes.

The court overruled the plea and offer of proof, and the defendant's counsel thereupon moved the court to set aside the indictment upon the grounds set forth in the special plea, and offered to prove the facts as before, which motion was denied, and this was followed by a motion to quash the indictment upon the same grounds and upon the offer of the same proof, which motion was also denied. The defendant thereupon interposed the plea of not guilty, and a jury was ordered to be impaneled to try the issue. The defendant's counsel thereupon objected to the panel of petit jurors, on the ground of the unconstitutionality of the act of 1881, under which the list of petit jurors was selected, and offered to substantiate the facts hereinbefore stated by proof. The court overruled the objection, and a jury was impaneled and the trial proceeded and resulted in the conviction of the defendant of the crime charged in the indictment. It will contribute to a clear understanding of the question raised in respect to the constitutionality of the act of 1881, to have in view the laws in force at the time of the passage of that act, regulating the selection of grand and petit jurors in the county of Albany. Prior to the act of 1881 grand jurors in the county of Albany were selected under the general provisions of the Revised Statutes. The list was prepared by the supervisors of the county (2 *Rev. Stat.*, 720, *sec. 31 et seq.*), and was returned by them to the county clerk, who placed the names in a box, from which from time to time, prior to the terms of the courts, the names of twenty-four persons were drawn to serve as grand jurors. The petit jury list was also made up in accordance with the system prescribed by the general statutes for the

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selection of petit jurors in the counties of the state, with a single exception, viz: the selection of persons in the city of Albany to serve as petit jurors, instead of being made by the supervisors, assessors and town clerk, as provided in case of towns, was made by the supervisor and assessor of the respective wards, each ward being for that purpose considered as a town. This method of selecting petit jurors in the city of Albany was first prescribed by the Revised Statutes (2 *Rev. St.*, 413, *sec.* 23), and the provisions of the Revised Statutes upon that subject as to the city of Albany were incorporated into the Code of Civil Procedure, passed in 1876, in the article relating to the mode of selecting, &c., trial jurors, as section 1104.

The next legislation on the subject of grand and petit jurors in Albany county, was chapter 532, Laws of 1881, which is the act now in question. That act was purported to amend section 1041 of the Code of Civil Procedure by inserting therein the following provisions: "In the city of Albany the recorder of the said city shall perform the duties imposed by this title upon the supervisor, town clerk and assessors of towns. In Albany county grand jurors shall hereafter be drawn from the box containing the names of petit jurors selected for said county, in the same manner as petit jurors, and hereafter no separate list of grand jurors shall be prepared for said county." This act, if valid, effected an entire change in the system of selecting grand jurors in Albany county. It abrogated the provisions of the Revised Statutes, imposing upon the supervisors of the county the duty of preparing a list of grand jurors, and made the petit jury list *pro hac vice* the grand jury list also. Thereafter there was to be neither a separate grand jury list nor a separate box containing the names of persons selected as grand jurors. The change in respect to the selection of petit jurors made by the act of 1881 was much less radical and consisted simply in the substitution of the recorder of the city of Albany, in place of the supervisors and assessors of the wards, to dis-

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charge the duty of preparing the jury lists in that city. The act of 1881, so far as it relates to the selection and drawing of grand jurors for the city and county of Albany, is a local act upon that subject and is within the prohibition of article 3, section 18 of the constitution, unless excepted therefrom by force of section 25 of the same article. That section is as follows :

“SECTION 25. Section seventeen and eighteen of this article shall not apply to any bill, or amendments of any bill, which shall be reported to the legislature by commissioners appointed pursuant to law to revise the statutes.”

It is a part of the legislative history of the state that prior to the adoption of the constitutional amendments of 1874 commissioners to revise the statutes had been appointed by the legislature, who had from time to time made reports of their proceedings to that body, and when the constitutional amendments were adopted they had not completed their labors but were still engaged in the work of the revision.

The plain object of section 25, article 3, which was one of the amendments adopted in 1874, was to exempt from the operation of section 18 private or local bills which had been, or should be, reported by the commissioners. But with the exception of bills originating with the commissioners and reported by them to the legislature the prohibition of section 18 is absolute. The language of the section needs no interpretation. Construed in connection with section 25 it forbids the enactment of any private or local law by the legislature in the cases enumerated therein and not falling within the exception in section 25. The legislative power vested in the senate and assembly is subject to the limitations of the constitution, and it needs no citation of authorities to show that the legislature, like every other department of the government, is subject to the supreme will of the people as expressed in the organic law.

If the proof offered by the defendant in support of his plea was admissible, and the facts offered to be proved were estab-

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lished, there can be no doubt that the part of the act of 1881 relating to the selection and drawing of grand jurors in Albany county is unconstitutional. The intention of the act was to take Albany county out of the operation of the general statutes of the state relating to the selection and drawing of grand jurors, and to institute for that county a special system applicable to the county alone. But it is understood by the counsel for the people that the unconstitutionality of the act cannot be established by proof *aliunde* that the act was not reported to the legislature by commissioners. We have no doubt that the presumption in favor of the constitutionality of statutes applies in this case, and that in the absence of proof to the contrary it will be presumed, in support of the constitutionality of the act of 1881, that it originated in a bill reported by commissioners. But the question whether a statute is constitutional is in its nature a judicial one. The question most frequently arises upon the face of the statute itself, and the question of constitutionality is determined by comparing the statute with the constitution. But it often depends upon extrinsic facts not appearing upon the statute book. In cases involving the constitutionality of what are known as two-third bills it has been held that the court may go behind the statute book and look at the original bill to ascertain whether it was passed by the constitutional majority (*People agt. Purdy*, 2 *Hill*, 31; *S. C.*, 4 *Hill*, 384).

The case here is of the same nature, but arises upon a different limitation of legislative power. The proof offered did not contradict any fact asserted on the face of the statute, nor, so far as appears, in any legislative record. On the contrary, the offer was to show by the journal of the legislature and by the original act the facts averred in the plea. The constitution would afford very slight protection against legislative usurpation, and the object sought to be accomplished by the amendment in question, could be easily frustrated, if the mere fact that the legislature had passed a local or private bill in one of the enumerated cases, created a conclusive presump-

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tion that the bill was originally reported by commissioners, and was within the exception of section 25. The tendency of judicial authority supports the proposition that whenever a question arises as to the constitutionality of a statute, the court may resort to any source of information, which in its nature is original evidence of any fact relevant to the inquiry (*Purdy* agt. *The People*, 4 *Hill*, 384; *Gardner* agt. *The Collector*, 6 *Wall.*, 499; *Post* agt. *The Supervisors*, 105 *U. S.*, 667; *Barry* agt. *Baltimore, &c., R. Co.*, 41 *Md.*, 446; *Opinion of Justices*, 52 *N. H.*, 623).

This rule excludes all inquiry as to the motives of the legislature in passing the particular statutes. Such an inquiry is wholly irrelevant, the only inquiry permitted being whether the enactment, the constitutionality of which is assailed, is forbidden by the constitution.

We think the offer to prove by the journal of the legislature and by the original act that the act of 1881 was not reported by commissioners, was properly overruled, and as the facts alleged must be deemed on this appeal to have been proved, the conclusion that the act, so far as it relates to the selection and drawing of grand jurors, is unconstitutional, cannot be avoided.

The question of the constitutionality of the act of 1881, so far as it relates to the selection of petit jurors, depends upon different considerations. When the act of 1881 was passed, there was a local act then in existence, regulating the selection of petit jurors in Albany county. By the existing law, which was enacted first by the Revised Statutes, and re-enacted by the Code of Civil Procedure in 1876, the selection of petit jurors in the city of Albany was committed to the supervisors and assessors of the respective wards of the city. The only change made by the act of 1881, as has been said, was to make the recorder the selecting officer, in place of the supervisors and assessors. There can be no doubt that the act of 1881, by which this change was wrought, was a local law. The point to be determined is whether it was a local law for the

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selection of petit jurors within the sense and meaning of article 3, section 18 of the constitution. It seems quite plain that the amendment of an existing local law regulating the selection of petit jurors, which simply transferred the power to select the petit jurors within the city from one local officer or set of officers to another local officer, is not within the mischief at which the constitutional amendment was aimed. By the existing local laws the city of Albany was taken out of the general plan. The legislature by the act of 1881, left this law in force, changing it only in the respect mentioned. The qualifications of petit jurors were prescribed by the Revised Statutes, and the provisions of the Revised Statutes upon the subject were substantially resurrected in the Code in 1876 (2 *R. S.*, 411, *sec.* 13, *Code Civ. Pro.*, *sec.* 1027.) It was made the duty of the selecting officers to select from the last assessment-roll of the town (or city) and to make a list of the names of all persons whom they believed to possess the qualifications prescribed by the general statute (*Code Civ. Pro.*, *sec.* 1036). This duty was in the main ministerial, and in the city of Albany, prior to the act of 1881, was devolved upon the supervisors and assessors of the ward, and by that act, on the recorder.

We think it would be too strict a construction of the constitutional provision to hold that no existing local law upon the subjects mentioned in article 3, section 18, of the constitution can be amended in any detail, without violating the constitution. This question was considered, to some extent, by this court, in the *Rapid Transit cases* (70 *N. Y.*, 327; *Id.*, 361). In the cases first referred to, EARL, J., referring to the section of the constitution now in question, said: "These constitutional provisions do not prohibit a private corporation by regulating powers, rights, privileges and franchises which it previously possessed," and in the case last cited, CHURCH, J., referring to the same provisions, said: "They must be sustained and applied by a rational and practical construction, so as to subserve the purposes intended, and prevent the evils

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designed to be remedied but not by an artificial and technical construction, to be extended in their application to cases never contemplated." It is a plain proposition recognized in the cases referred to, and in the subsequent case, *In re Brooklyn, &c.* (75 N. Y., 375), that the legislature cannot, under the guise of an amendment of a private and local bill, make a new and original enactment in evasion of the constitutional prohibition.

The act of 1881, in reference to petit jurors, is not, we think, within this principle. It did not inaugurate a local system for the selection of petit jurors in the city of Albany, but, as we have said, continued an existing one, changing it in one of its details. Special laws have been passed and are now in force, regulating the selection of jurors in the counties of New York and Kings. These laws extend to great detail, and contain many special provisions. It would be a dangerous construction of the constitutional provision which would prohibit any alteration in those and like statutes, and place it beyond the power of the legislature to amend any of their provisions.

The question before us is not free from difficulty, but our conclusion is that a reasonable and practical construction of the constitution upholds the act of 1881 in respect to the substitution of the recorder in place of the supervisors and assessors to discharge the duty of preparing the petit jury lists, and that this conclusion fairly rests on the ground that the act is not, in a proper sense, an act for the selection of petit jurors, but a regulation of an existing local law on the subject, not within the purview of the constitutional prohibition.

The next question which arises is whether the arrangement and trial of the defendant upon the indictment in question was a violation of the constitutional guaranty that no person shall be held to answer for a capital or otherwise infamous crime (except in certain cases mentioned, not material to the present inquiry), "unless on presentment or indictment of a grand jury" (*Constitution, article 7, section 6*). It is insisted

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on the part of the defendant that the body of men which found the indictment in question, was not a grand jury, that the paper filed as an indictment was not an indictment, and that the defendant could not be held to answer thereto, or be put upon his trial thereon. In considering this question it will be convenient, in the first place, to recall the actual facts. The objection to the constitution of the grand jury which found the indictment, lies solely in the fact that they were drawn, under the provisions of a void statute, from the petit jury list, whereas they should have been drawn from a list of grand jurors specially selected to serve as such by the supervisors of Albany county. In all other respects the proceedings were regular. The jurors were drawn by the proper officer, they were regularly summoned and retained by the sheriff; they were recognized, impaneled and sworn as grand jurors by the court, and as grand jurors they found the indictment; and moreover they were good and lawful men, duly qualified to sit as grand jurors. None of these facts are negatived by the plea, and they must be assumed in determining the question before us.

The principle that no person shall be put upon trial for an infamous crime unless on presentment or indictment of a grand jury, has been regarded as one of the securities of civil liberty, and is embodied among the fundamental provisions of the federal and state constitutions. The institution of the grand jury has been said, by high authority, to be one of the barriers between the liberties of the people and the prerogatives of the crown (4 *Blk.*, 349). The interposition of a body of competent citizens, charged to inquire of offenses between the individual and the state, and the finding of a formal accusation upon such inquiry, before he can be put upon his trial for an infamous crime, forms the substance of the right guaranteed by the law of England and by the constitution of the state. But the constitution does not define what shall constitute a grand jury. It refers to the grand jury as an existing institution, and its essential character must be found by reference to

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the common law, from which it has been derived. By the common law a grand jury must consist of not less than twelve or more than twenty-three, and twelve must concur in finding an indictment; and they must be good and lawful men of the county (*Hawk. B. C.* [vol. 2], chap. 25, sec. 16; *Chitty's Crim. Law* [vol. 7], 307). The constitution does not define the mode of selection, and it has never been supposed that the states, in adopting the common law institution of the grand jury, adopted the mode of selection which prevailed in England. In England grand jurors were formerly selected by the sheriffs (2 *Hawk. P. C.*, chap. 25, sec. 76), but in this state the sheriff is the summoning and not returning officer, and has no part in the selection or preparation of the grand jury; and it is doubtless competent for the legislature to enact such regulations and make such changes respecting the mode of selecting and procuring grand jurors as it may deem expedient, not trenching, however, upon the essential features of the system (*People agt. Stokes*, 53 *N. Y.*, 164).

We are of opinion that no constitutional right of the defendant was invaded by holding him to answer to the indictment. The grand jury, although not selected in pursuance of a valid law, were selected under color of law and semblance of legal authority. The defendant, in fact, enjoyed all the protection he would have had if the jurors had been selected and drawn pursuant to the general statutes. Nothing could well be more substantial than the alleged right asserted by the defendant under the circumstances of the case. He was entitled to have an indictment found by a grand jury before being put upon his trial. An indictment was found by a body drawn, summoned and sworn as a grand jury, before a competent court, and composed of good and lawful men. This, we think, fulfilled the constitutional guaranty. The jury which found the indictment was a *de facto* jury, selected and organized under the forms of law. The defect in its constitution, owing to the invalidity of the law of 1881, affected no substantial right of the defendant. We confine

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our decision upon this point to the case presented by this record, and hold that an indictment found by a grand jury of good and lawful men, selected and drawn under color of law, is a good indictment by a grand jury within the sense of the constitution, although the law under which the selection was made is void. It will be time to consider the extreme cases suggested by counsel when occasion rises.

The remaining question relates to the right of the defendant to avail himself by plea, or objection in other form, of the defect in the proceedings in selecting or drawing the grand jury which formed the indictment. If the defect in the constitution of the tribunal deprived it of the character of a grand jury in a constitutional sense, there can be no doubt that the court would have been bound to take notice of it, although no statute authorized it, or even if the statute assumed to preclude the raising of the objection. But when the defect is not of that character, and the defendant may be held to answer the indictment without invading any constitutional right, then the question is one of procedure merely, and the right of the defendant to avail himself of the objection is subject to the regulation and control of the legislature.

In times past courts have been inclined to go very far in sustaining technical objections in criminal cases, but there is much less reason for this now than formerly, when comparatively trivial offenses were punished with the greatest severity. The indictment in question was found after the Code of Criminal Procedure was enacted and took effect, and the proceedings are governed by its provisions. We are of opinion that under the provisions of the Code the court was justified in refusing to entertain the objections made. Section 328 prohibits any challenge to the panel or array of grand jurors, but the court is authorized, in its discretion, for certain causes stated, to discharge the panel and order another to be summoned. Section 239 provides for challenges to individual jurors. Both of these sections relate to proceedings to be taken before indictment, and are irrelevant to the present

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inquiry. Section 312 provides that in answer to an indictment the defendant may either move the court to set the same aside, or may demur or plead thereto. The causes for which the defendant may move to have the indictment set aside, are defined in section 313. Section 321 declares that the only pleading on the part of the defendant, is a demurrer or plea, and section 332 declares that pleas are of three kinds: (1) guilty; (2) not guilty; (3) a former judgment of conviction or acquittal.

The paper filed by the defendant was not a plea authorized by the section last mentioned, and the motion to quash or set aside the indictment is not for any cause embraced in section 313. The Code, by defining the causes for which the indictment may be set aside, must, by the general rule of construction, be held to exclude the entertaining of the motion, for other causes than those testified. The intention of the Code was to discourage technical defenses to indictments, not affecting the merits, as is apparent from the sections cited, as well as the provisions relating to amendments, and the proceedings on the trial (*Code Crim. Pro.*, secs. 293, 362). This general purpose is more directly indicated by section 285, which declares "that no indictment is sufficient, nor can the trial, judgment or other proceedings be affected by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits. We think the objection to the grand jury was not one which, by the new procedure, the defendant could take after indictment, and, as it involved no constitutional right, that it was properly overruled.

These reasons lead to an affirmance of the judgment.

All concur.

Adams Express Company agt. Board of Police.

N. Y. SUPERIOR COURT.

THE ADAMS EXPRESS COMPANY agt. THE BOARD OF POLICE.

Penal Code—constitutionality of, in its relation to inter-state commerce—Power of the court.

If the Penal Code is susceptible of such a construction as would interfere with the inter-state traffic of an express company, such provisions are unconstitutional and void, because they violate the provisions of the Constitution of the United States, which delegates to congress the exclusive power to regulate commerce among the several states.

The court has power, in a proper case, to grant an injunction where the police board threaten to interfere with the business of an express company in the transmission of express matter in transit through the state of New York.

Although an express company would not be justified in transacting its ordinary business or receiving and delivering merchandise on Sunday, yet they may, despite the provisions of the Sunday clause of the Penal Code, carry express matter through the city of New York on Sunday, from the Jersey City ferry to the Grand Central depot, and if the police threaten to interfere the court will grant an injunction to restrain them from such interference.

Special Term, March, 1883.

MOTION for injunction to restrain defendants from interfering with plaintiffs' business.

Clarence A. Seward, for plaintiffs.

Geo. P. Andrews, corporation counsel, for defendants.

ARNOUX, J. — Plaintiffs transact business of a three-fold character, the most important being the transmission of express matter in transit through the state of New York, and in part through the city of New York, the receipt of freight and the delivery of freight in this city.

So far as the power of the court is concerned to grant an injunction where the defendants threaten to interfere with the

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business of plaintiffs, the question has been examined and determined in favor of the power of the court in a proper case in *The Manhattan Iron Works agt. The Board of Police*.

Even if an erroneous conclusion had been arrived at in that case, the court unquestionably has jurisdiction in this case, for the reason that the defendants suggested to plaintiffs that this course should be pursued, as appears by the papers presented to the court.

This case involves the consideration of two questions: First, the inter-state express traffic; and second, the domestic business of the plaintiff.

In respect to the first, the complaint shows that the plaintiffs have no means of storage of the goods in transit, either at Jersey City or at the Grand Central depot. The result would be to permit the railroad to discharge the goods into the street and to compel the plaintiff there to place guards over it, with the consequent risk of theft, and damage by the elements.

It cannot be presumed that the legislature passed this law to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community, and on making full satisfaction (*Calder agt. Bull*, 3 *Dall.*, 386). Such a presumption would be, to use the language of the supreme court of the United States, in *Green agt. Barry* (15 *Wall.*, 610), "contrary to reason and justice, and to the fundamental principles of the social compact."

If the Penal Code is susceptible of any such construction, however, as would interfere with the inter-state traffic of the plaintiff, such provisions are unconstitutional and void, because they violate the provisions of the Constitution of the United States, which delegates to congress the exclusive power to regulate commerce among the several states (*U. S. Const.*, art. 1, sec. 8, sub. 3). This is decided by the supreme court of the United States in *Railroad agt. Hughson* (95 *U. S.* [5 *Otto*], 469), so that whatever doubt may have heretofore existed respecting the right of a state under its police power to arrest

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inter-state commerce heretofore existing, such doubt has been forever removed.

A different rule prevails, however, where the state is the initial or terminal point. There the regulation above quoted has no application. The state may restrict or prohibit the business to be therein transacted, provided it does not violate well-known rules of legislation and equity.

So where a thing may lawfully be done, but a certain method is ordained to be *malum prohibitum*, the law must be enforced and cannot be restrained by injunction. This distinction is clearly pointed out in *Davis agt. The American Society for the Prevention of Cruelty to Animals* (75 N. Y., 362). The law made cruelty an offense. Plaintiffs were extensively engaged in the business of slaughtering hogs. The president of the defendant announced that they must discontinue slaughtering hogs by the methods then used, and that he would arrest all persons engaged in it and stop their business as often as he found plaintiffs conducting it in that way. Observe that it was not the fact of killing the animals that, in the eye of the law, constituted the offense, but it was the method that plaintiffs adopted. So in the case at bar, it is not every act that plaintiffs may do on Sunday that is exempt, nor every act exempt.

It must depend upon the nature and necessity of the act. There may be perishable articles in their possession whose delivery is essential to its owners. The plaintiff certainly would not be justified (and its distinguished counsel has, in the beginning of his argument, forstalled any such supposition) in transacting its ordinary business, or receiving and delivering merchandise on Sunday.

No general rule can be laid down to govern such a case. They must be dealt with as they arise.

Therefore, as to domestic matters, that is, goods to be received and delivered in this city, the injunction is denied; as to goods in transit the injunction against defendant is continued.

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SUPREME COURT.

CHARLES SCHULTZ, as executor, &c., agt. JOSEPH ROSE.

*Specific performance of contract for sale of land—When it will not be decreed—
Title by adverse possession.*

In an action by a vendor for a specific performance of a contract for the purchase of land, it appeared that for a portion of the premises the vendor and those through whom he claimed had no title by deed, but that their title and ownership rested upon adverse possession only: .

Held, that the vendee was not bound to accept such title, or in equity to fulfill the contract.

Also, that if the title, on close scrutiny, is not free from reasonable doubt and flaws, which indicate probable danger, sufficient to caution a prudent man against hostile claims of others, specific performance will not be decreed.

Also, that a purchaser will not be obliged to take a title which depends upon a matter of fact which is not capable of satisfactory proof, or if capable of proof yet is not so proved; and if after the vendor has produced all the proof he can, a reasonable doubt still remains, the title is not marketable, and the purchaser is not bound to take it.

Special Term, April, 1883.

ACTION for specific performance.

B. A. Carpenter, for plaintiff.

Edward F. Hassey, for defendant.

VAN VORST, *J.* — This is an action brought by the executor of Charlotte Cohn, deceased, to compel the specific performance on the part of the vendee, the defendant, of a contract for the purchase of the house and lot of land known as 337 East Eighth street, in the city of New York. Numerous objections were urged by the defendant's counsel at the trial to the title to the premises in question. Several of them are quite unimportant, and may be at once dismissed. Among the objections, however, which are urged are several which demand serious attention, and an examination of these leads

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to a conclusion fatal to the plaintiff's demand for a specific performance of the contract of purchase.

To refuse a specific performance of a contract for the purchase of real property, it is not incumbent on the court to judicially determine that there is such inherent defect in the title as that it cannot in the end be cured. It is sufficient to justify the court in withholding this peculiar relief that upon close scrutiny the title seems doubtful; that it discloses apparent flaws which indicate possible or probable danger sufficient in character to caution a man of reasonable prudence against claims and rights adverse to those of the vendor. The defects, however, must have a substantial basis. The purchaser is justified in demanding a title upon which he may reasonably rest secure without apprehension from hostile claims of others, which the state of the record and muniment of title give good reason to fear may at some time be interposed.

Three objections are raised by the defendant which render the title at least doubtful. In the order of time they are as follows:

First. In the year 1829, one Charles F. Dinnies conveyed the premises in question to Thomas G. Talmage, Lewis Van Pelt and Henry Miller. By its terms the conveyance was absolute on its face, and it passed the estate in fee to the grantees, charged with no trust, and fettered with no conditions.

Two years later Thomas G. Talmage and Lewis Van Pelt, two of the grantees in the last mentioned conveyance, executed a deed of the premises to one Joseph B. Beekman. This deed was placed on record, and is a link in the chain that sustains the seizin of the plaintiff's testator. This deed contains several recitals, to the effect that the preceding deed from Dinnies to Talmage and others was in the nature of a mortgage, and had been made at the request of Beekman, to whom the land really belonged, to secure an indebtedness from him to Talmage, Van Pelt and Miller as copartners, and that Miller had died, leaving Talmage and Van Pelt surviving; that such arrangement and disposition of the debt due to

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Talmage, Van Pelt and Miller from him had been made; that it was proper that the collateral security for its payment should be relinquished and given up. Hence the conveyance to Beekman by Talmage and Van Pelt. As a matter of fact, it appears that the grantee Miller had died prior to the date of the conveyance from Talmage and Van Pelt to Beekman.

Although the grantees Talmage, Van Pelt and Miller may have been in fact copartners, and how that is I cannot tell, yet the conveyance to them was as tenants in common by an absolute title. At the death of Miller, therefore, his children became seized as tenants in common of an undivided one-third part of the premises in question, subject to their mother's right of dower. Their rights have never been divested, as appears by the record, although ousted from possession by the act of their cotenants, Talmage and Van Pelt.

These persons are not estopped by the recitals in the deed from Talmage and Van Pelt to Beekman, to which they were not parties.

These recitals may or may not be true. These recitals bind only the parties to the instrument, the grantors and grantees, and the rights of others are wholly unaffected thereby. A judicial determination of the rights of the respective parties to the premises in question, in a proceeding in which the heirs-at-law of Miller were properly represented, could alone bind them, or divest them of whatever estate they apparently had in the premises while they remained infants, and subsequent to their attaining their majority a release would be requisite to free the title of their interest.

Had the conveyance to Talmage, Van Pelt and Miller been to them as copartners, and had it appeared on the face of the deed that the conveyance was made as security only for a debt due the firm, it may be that the surviving partners might have reconveyed on being paid their debt. But it is not necessary to decide that.

The possession of one joint tenant is the possession of all, and until the actual ousting of the heirs-at-law of Miller, by

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the conveyance made by Talmage and Van Pelt and the delivery of the premises to Beekman, a title by adverse possession could not begin. This deed bears date in 1831.

The ages of the children of Miller at the time of his death does not appear, and no light is thrown upon their subsequent career. Where all things are unknown, who can say that anything is improbable?

Though the period of time be long—fifty-two years—it is still hard to say that the rights of all the children of Miller, or their heirs, have been destroyed by a continuous hostile and adverse possession of twenty years. The question is one of fact and its solution must be doubtful, and a purchaser should not be compelled to take a title in respect to which such a doubt exists.

He is entitled to a title free from reasonable doubt, and such as is, without question, marketable. And this leads to the consideration of the second and third objections raised by defendant to the goodness of the title in question.

In the year 1839, one Titus, who had succeeded to the estate of Beekman, conveyed the premises in question to Gerard Crane and five others, as tenants in common. By virtue of several *mesne* conveyances, Gerard Crane became the owner, as the record shows, of nineteen twenty-fourths of the premises in question. There is no evidence to show that he ever claimed a title to the remainder of the premises.

It does not appear that Titus and Angenine, two of the cotenants with Gerard Crane, ever parted with their interest in the property. In 1859 Gerard Crane, by a full covenant deed, conveyed the premises to the husband of Charlotte Cohn, and during her life, by proper conveyances, she became seized of the premises as they were conveyed to her husband. The plaintiff, as executor of and under her will, made the sale to the defendant which is sought to be enforced herein.

And yet this hiatus in the chain of title, owing to the outstanding and unextinguished interest of Angenine and Titus, the plaintiff asks to bridge by a claim of adverse possession.

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To compel a purchaser to accept a title founded exclusively upon adverse possession, unless the facts of the case were clear and free from all reasonable doubt, would assuredly be an abuse of the powers of a court of equity. A decision of this court in an action for specific performance can heal no inherent weakness or restore a broken link in the chain of title, unless the facts and parties, essential and affected, are before it, and in a relation and condition to be dealt with.

Experience shows that titles founded upon an adverse possession exclusively are subject to be disturbed by claims arising from quarters often unexpected, and which it was supposed, or hoped, had been effectually cut off by lapse of time, the assertion of which, however, was delayed by conditions and disabilities which the law created and favored.

Titus and Angenine were tenants in common with Gerard Crane. That being the case, his possession was their possession; and unless by acts open and notorious, and to which their attention severally was personally directed, that he laid claim to the entire possession in hostility to their rights, a title by adverse possession, antagonistic to (and superior to) the record title, did not begin to run until the deed from Crane to Cohn in 1859 (87 *N. Y.*, 348).

No evidence has been adduced to show that this was the case, or that there are no claimants under Titus and Angenine who may not, in the future, assert a valid claim to a portion of this property, and who have not been heretofore hindered in some way from asserting the same by some lawful disability.

The burden rested upon the plaintiff to show that he had a good title (*Wilson* agt. *Holden*, 16 *Abb. R.*, 133).

A purchaser at a judicial sale even has a right to expect that he will acquire a good title, and he will not be compelled to accept a deed when the title is doubtful and a claim to the property exists in favor of persons who are not parties to the action which might impair the value of the real estate by casting a cloud over the title or by subjecting the purchaser

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to the risk of a contest at law (*Argull* agt. *Raynor*, 20 *Hun*, 267).

A purchaser will not be compelled to complete the purchase where there is some reasonable ground of evidence shown in support of an objection to the title, or where the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of proof, yet it is not so proved; and if, after the vender has produced all the proof he can, a reasonable doubt still remains, the title is not marketable and the purchaser is not bound to take it (*Shriver* agt. *Shriver*, 86 *N. Y.*, 575; *Mott* agt. *Mott*, 68 *N. Y.*, 258).

And with regard to the subject of adverse possession, ALLEN, *J.*, in *Hartley* agt. *James* (50 *N. Y.*, 42) says: "The defendants had no paper title, or such paper title as was sufficient in law, and the plaintiff was not bound to accept a title resting upon adverse possession, had such a title been shown."

To justify a decree in favor of plaintiff in a case like the present there should be a moral certainty that the purchaser will receive a good title.

It may be that the doubts arising in this case may all be dispelled by proof, and that the plaintiff has in fact a good title, and upon that I shall cast no unnecessary cloud, but the defendant shall not be compelled to assume the risk. The risk should remain where it is—upon the plaintiff.

The result reached is that the court is not justified in authorizing a decree for specific performance, and there must be judgment in favor of the defendant, dismissing the complaint with costs, and an affirmative judgment in favor of defendant for the recovery of the ten per cent paid by him on the purchase, with the auctioneer's fees on the executor's sale and his expenses incurred in the examination of the title. Findings of fact and conclusions of law shall be prepared by defendant and a copy served on plaintiff's attorney, with notice of settlement of five days.

The People agt. Globe Mutual Life Insurance Company.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.

*Rent — Apportionment of — Laws of 1875, chapter 542 — When rent shall be
apportioned.*

Prior to the passage of the act (*Laws of 1875, chap. 542*), there was, as a general rule, no apportionment of rents, except by agreement. The landlord or owner of the premises, at the time the rent became payable, collected and received the same, and the landlord or owner of the property during a part of the period such rent was earned, but not sustaining towards it either relation at the date the rent was payable according to the terms of the lease had no redress against the party receiving the payment except by special agreement.

By the statute (*Laws of 1875, chap. 542*), which reverses the common law rule, the right to the rent follows the ownership of the estate during the period it was earned by the property.

Where prior "to the" 11th day of June, 1881, on which day E. became the owner thereof by a conveyance from F., E. occupied the premises as the tenant of F. By the terms of the lease the rent was payable on the first day of each month, in advance. With the transfer of this property by the deed on the 11th day of June, 1881, the lease was also assigned, but on that day the receiver demanded and received from E the rent for the property during such month of June, which by the lease had become due on the first day of the month and was a payment in advance.

Held, that as F. had title during eleven days only in the month of June, 1881, he had no right to receive and retain the rent for the entire month but was entitled to eleven-thirtieths thereof, and the remainder belonged to E., the owner, and that F. should restore to E. the amount of rent earned after the eleventh day of June.

Ulster Special Term, December, 1881.

MOTION in behalf of Rosina E. Eddy for the repayment to her of rent. The facts are stated in the opinion.

Henry L. Sprague, for the motion.

George W. Wingate, opposed.

The People agt. Globe Mutual Life Insurance Company.

WESTBROOK, J. — Prior to the 11th day of June, 1881, on which day she became the owner thereof by a conveyance from the receiver, Rosina E. Eddy occupied the premises No. 110 West One Hundred and Twenty-third street, in New York city, as the tenant of James D. Fish, the receiver of the Globe Mutual Life Insurance Company.

By the terms of the lease the rent was payable on the first day of each month in advance. With the transfer of the property by deed on the 11th day of June, 1881, the lease was also assigned, but on that day the receiver demanded and received from the petitioner the rent for the property during such month of June, which by lease had become due on the first day of the month, and was, as has just been stated, a payment in advance of the occupancy. The payment was made under protest, and the only question which the parties have submitted on the motion is: Was the receiver entitled to the rent of the whole month, or should he only have taken it for that part of the month during which he was the owner?

Prior to the passage of the act (*chap. 542 of the Laws of 1875*), entitled “An act to provide for the apportionment of rents, annuities, dividends and other payments,” there was as a general rule no apportionment of rents except by agreement. The landlord or owner of the premises at the time the rent became payable, collected and received the same, and the landlord or owner of the property during a part of the period such rent was earned, but not sustaining towards it either relation at the date the rent was payable according to the terms of the lease, had no redress against the party receiving the payment except by special agreement (*Taylor’s Landlord and Tenant* [6 ed.], sec. 387; *Clapp* agt. *Astor*, 2 *Edward’s Ch. R.*, 379; *Zule* agt. *Zule*, 24 *Wend.*, 76; *Wilson* agt. *Harman*, 2 *Vesey, Sr.*, 672).

The same principle (see authorities just cited) was also applied to “annuities, dividends and other payments,” for the apportionment of which, as well as of rents, the act aforesaid now professes at least to make provision, because its title is

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(repeating it in this connection), "An act to provide for the apportionment of rents, annuities, dividends and other payments." If the object of the law, as thus declared by its title, has been embodied in its enactments, the old rule must be reversed. Let us then look at its language and see if there is any doubt as to its purport.

Stripping the first section of all superfluous verbiage, and giving only the words relating to rents, it reads as follows: "All rents reserved on any lease granted after the passage of this act * * * shall be apportioned so that on the death of any person interested in any such rents * * * or in the estate * * * from or in respect to which the same shall issue or be derived, or on the determination by any other means whatever of the interest of any such person, he or she, and his or her executors, administrators or assigns shall be entitled to a proportion of such rents * * * according to the time which shall have elapsed from the commencement or last period of payment thereof * * * including the day of the determination of his or her interest."

The second section gives a remedy for the recovery of such apportioned parts of the rent, after the same "shall become due and payable," as he or she would have had if then entitled to the whole rent; but the party obliged to pay the rent must pay to the person who would have been entitled to receive it if the act had not been passed, and the person or persons entitled by the act to receive the apportioned part is given a remedy against the individual receiving it, for the share thereof due by force of the act.

There can then, it seems to me, be no doubt as to the law governing this application. The common law did not apportion rent, but the act of 1875 professes to apportion it, and it does, for it most explicitly declares, when the estate or interest of the party previously receiving the rent terminates intermediate two periods fixed by the lease for its payment, then such rent "shall be apportioned." This statutory mandate can of course only be obeyed by giving to the old and

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to the new owner of the estate the proportion which is earned by the property during the ownership of each; and this result is moreover expressly declared by awarding to the individual whose estate is terminated "a proportion of such rents * * * according to the time which shall have elapsed from the commencement or last period of payment thereof, * * * including the day of the * * * determination of his or her interest." As then the rule of apportionment and its manner of computation are both enacted they must be applied to the present. By the statute, which reverses the common law rule, the right to the rent follows the ownership of the estate during the period it was earned by the property, and as Mr. Fish had title during eleven days only in the month of June, 1881, he had no right to receive and retain the rent for the entire month, but was entitled to eleven-thirtieths thereof, and the remainder belonged to the new owner, who is the moving party in this proceeding.

There must be an order to restore to the petitioner such proportion of the rent of the month of June, 1881, as was earned by the property after the eleventh day of that month.

N. Y. MARINE COURT.

GEORGE M. MITNACHT agt. LYDIA C. COCKS *et al.*

Summary proceedings — Execution sale of leasehold interest — Sale must be advertised and conducted as a sale of real property, to entitle the party to invoke the aid of summary proceedings.

To maintain summary proceedings to remove a judgment debtor after a sale of leasehold interests on execution, the sale must be advertised and conducted as a sale of real property. Advertising and selling such interests as personal chattels do not satisfy the statutory requirement in regard to summary proceedings.

Trial Term, March, 1883.

Mitnacht agt. Cocks *et al.*

TRIAL without a jury.

The above named George M. Mitnacht instituted summary proceedings under the statute, to recover the possession of premises No. 129 Fifth avenue, in the city of New York.

The petitioner claims such possession as the purchaser at a sheriff's sale of all the right, title and interest of Lydia C. Cocks, a judgment debtor of, in and to two certain leases, to wit:

1. One made by Mary A. Kieff to the said Lydia C. Cocks of the aforesaid premises, No. 129 Fifth avenue, and of the furniture therein, for the term of eight months, commencing September 1, 1882, and terminating May 1, 1883.

2. The other made by Mary A. Kieff to Anna Franger of part of said premises, for a term commencing November 8, 1881, and terminating May 1, 1883, which lease was assigned to said Lydia C. Cocks, and was owned by her at the time of the sheriff's sale, which took place February 16, 1883.

It will be observed, therefore, that these leases had but two and a-half months to run at the time of the sheriff's sale.

The question presented is whether, under such circumstances, the petitioner has acquired such a title to said lease as authorizes him to invoke and maintain summary proceedings under the statute to recover possession of the premises claimed.

C. Fine, for petitioner.

I. C. Williams and *N. Cross*, opposed.

McADAM, *J.*—The leasehold interests of the judgment debtor were levied upon, advertised and sold as if they were personal property. This was probably legal (*Allen on Sheriffs*, 159). Having been advertised and sold as "chattel" interests they must be so regarded for all purposes in subsequent proceedings founded upon the sale. The statute invoked by the petitioner is entitled "Summary proceedings to recover the possession of real property," and section 2232 of the Code, under which the present proceeding was instituted provides * * * "that a person who holds over and continues in

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possession of real property * * * may be removed therefrom * * * where the property has been sold by virtue of an execution against him * * * and a title under the sale has been perfected." These provisions clearly indicate the legislative intent that in order to invoke the aid of summary proceedings there must be a sale of the leasehold interest, advertised and conducted in all respects like a sale of real property (3 *R. S.* [6th ed.], 638; *Bigelow agt. Finch*, 17 *Barb.*, 394). These proceedings are in derogation of the common law, and magistrates clothed with the power of entertaining them must find their authority in the statute or they are without jurisdiction.

The leasehold interest having been advertised and sold as personal property, the petitioner who purchased at the sale cannot invoke the aid of the statute, which in express terms limits its operation to real property. It follows that the proceeding must be dismissed for want of jurisdiction.

COURT OF APPEALS.

THOMAS MURTHA, appellant, agt. MICHAEL CURLEY *et al.*,
respondents.

Costs—Where a money judgment was recovered against defendant, who appealed to the general term, where the judgment was reversed and a new trial granted, "with costs to the appellant to abide the event of such new trial," and from such order the plaintiff appealed to the court of appeals, which reversed the order of the general term and affirmed the judgment of the special term, "with costs"—What costs to be allowed and to whom—Code of Civil Procedure, sections 8228, 8229, 8227, 8238.

Where the general term reversed a money judgment recovered against defendant at special term and granted a new trial, "with costs to the appellant to abide the event of such new trial," and the court of appeals then reversed the order of the general term, and affirmed the judgment of the special term, "with costs," the plaintiff was entitled to tax the costs of the appeal to the general term (*Reversing S. C.*, 64 *How.*, 465, and *affirming S. C.*, 64 *How.*, 222).

Murtha agt. Curley *et al.*

APPEAL from an order of the general term of the superior court of the city of New York, reversing an order of the special term.

Decided May, 1883.

Adolphus D. Pape, for appellant.

Starr & Hooker, for respondent.

EARL, J.—In this action a money judgment was recovered against the defendant. From that judgment he appeals to the general term of the New York superior court, where the judgment was reversed and a new trial granted, “with costs to the appellant to abide the event of such new trial.” From the order of the general term the plaintiff appealed to the court of appeals, which reversed the order of the general term and affirmed the judgment of the special term, “with costs.” Upon the taxation of costs plaintiff sought to tax the costs of the appeal to the general term. Upon objection on behalf of the defendant, the clerk disallowed such costs and plaintiff then appealed to the special term, which reversed the ruling of the clerk and directed him to tax the costs of the appeal to the general term. The defendant then appealed from the order of the special term to the general term, which reversed the order of the special term and affirmed the ruling of the clerk, and this appeal is from that order of the general term.

Section 3228 of the Code provides for the case in which a plaintiff is entitled to costs of course, and subdivisions, one, two and three of that section provide for costs in what are nominally called actions at law. Subdivision four gives costs to the plaintiff in “an action other than one of those specified in the foregoing subdivisions of this section in which the complaint demanded must be for money only.” Under this subdivision it does not matter whether the action be legal or equitable, the sole condition being that the judgment

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demanded must be for money only. Section 3229 provides that the defendants shall have costs of course in the same action specified in the preceding section, unless the plaintiff is entitled to costs as therein prescribed. Section 3230 provides that except as prescribed in the preceding two sections, the court may in its discretion award costs to any party upon the rendering of a final judgment. Section 3237 provides that the preceding sections "do not affect the recovery of costs upon an appeal," and then section 3238 provides that "upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows: 1st. In an action specified in section 3228 of this act the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal of the judgment appealed from, except that where a new trial is directed, costs may be awarded to either party absolutely, or to abide the event in the discretion of the court. 2d. In every other action, and also where the final judgment appealed from is affirmed in part, and reversed in part, costs may be awarded in like manner in the discretion of the court." It does not appear in the record before us what judgment was demanded in the complaint. From the fact a money judgment was rendered we may infer that a money judgment only was demanded in the complaint; and such from records in our possession we know to be the fact (90 *N. Y.*, 372).

Therefore this is a case where the plaintiff was entitled to costs of course, under section 3228. Upon the entry of the judgment in his favor, and as his judgment was finally affirmed in this court, he was, of course, entitled to his costs of the appeals to the general term and to this court under section 3238. But if we assume that this is an equitable action, that the costs are not controlled by subdivision 4 of section 3228, and that they rest in the discretion of the court the result is yet the same. Then, while the cause was pending in the supreme court, the costs were in the discretion of that court; and when it came here the costs were in the discretion of this court. The order of the general term would

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have governed as to the costs if a new trial had been had. But the plaintiff was not satisfied with that order; he did not take the new trial, but appealed to this court. That order was reversed and thus its entire effect was wiped out, and this court exercised its discretion upon the costs by affirming the judgment of the special term, "with costs." That means all the taxable costs subsequent to the judgment affirmed consequent upon the appeals both to the general term and to this court. The whole subject of costs both in the superior court, subsequent to the payment there and in this court, was then subject to the control of this court and it exercised its discretion by granting them to the plaintiff.

It follows, from these views, that the order of the general term should be reversed and that of the special term affirmed, with costs, and when we say "with costs" we mean the costs of the appeal to the general term and to this court.

All concur.

SUPREME COURT.

THE NEW YORK CENTRAL RAILROAD COMPANY agt. JOHN T.
HARROLD *et al.*

Judgment—When court will not entertain jurisdiction of actions to set aside judgments obtained upon actual trials upon conflicting evidence.

Where issues have been litigated in a former action, they cannot be retried in another between the same parties upon allegations that fraud, perjury and conspiracy have been committed by the prevailing party and his witnesses.

Although it is a legal principle well established, that where a judgment has been obtained by fraud, conspiracy and perjury, that equity will interfere to restrain its enforcement, still, like other general principles, this must be taken to apply to a case where proof of such fraud, perjury and conspiracy is admissible.

Therefore, when it appears that the same matter has actually been tried, the party is estopped to set up such fraud and crime, because the judgment is the highest evidence and cannot be contradicted.

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Special Term, March, 1883.

Deyo, Duer & Bauerdorf and *John H. Burger*, for plaintiff.

Chauncey Shaffer and *H. H. Dailey*, for defendants.

C. F. BROWN, *J.*—It appears from the complaint in this action that in May, 1880, the defendant Harrold recovered a judgment against the plaintiff for \$30,000 in this court. That such judgment was subsequently affirmed by the general term and the court of appeals. That after the affirmance of the judgment a motion for a new trial was made upon the grounds of newly discovered evidence, and denied, and that the order denying such motion was affirmed on appeal to the general term.

This action is brought against Harrold and two persons who were witnesses in his behalf on the trial of the former suit, and the general charge made against them in the complaint is, that they “conspired and confederated together to cheat and defraud the plaintiff out of a large sum of money by means of the action by said Harrold against the plaintiff.”

The relief sought herein is that the judgment recovered by Harrold be declared fraudulent and void and be canceled of record. I do not think the complaint states a cause of action.

The general legal principle may be conceded that where a judgment has been obtained by fraud equity will interfere to restrain its enforcement, but like other general maxims this must be taken to apply to a case where proof of fraud is admissible. And when it appears that the same matter has actually been tried, or so in issue that it might have been tried, it is not again admissible, the party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted (*Grum* agt. *Grum*, 2 *Gray*, 361; *U. S.* agt. *Throckmorton*, 98 *U. S. Rep.*, 61; *Ross* agt. *Wood*, 70 *N. Y. Rep.*, 8).

In the last case it was held that an equitable action cannot be maintained to annul a judgment rendered on conflicting,

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evidence upon the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury.

An analysis of the complaint shows that a trial of this action would present the same question that was litigated and determined in the former suit. After setting out a history of the first litigation, it is alleged in the fourth paragraph that "the only question litigated by the plaintiff was the extent and permanency of Harrold's injuries on the occasion of the accident." It further sets forth that upon that question a large number of witnesses were sworn on both sides, and with the exception of the defendant Barber, they were all physicians and experts. The fifth paragraph alleged that Harrold "was not seriously injured by the accident."

The sixth paragraph charges a conspiracy on the part of the defendant to defraud the plaintiff by swearing that Harrold was "seriously injured" by the accident.

The seventh paragraph states facts which the defendants Deyo and Baker testified to on the trial and alleges that they were untrue.

The eighth paragraph alleges that Harrold never suffered any "serious injury" as the result of the accident, and that the judgment obtained was the result of "a conspiracy."

The foregoing are all the material allegations of the complaint, and it is clear that but one question is presented, viz.: "Did the defendants swear falsely as to the extent of Harrold's injuries." This question necessarily depends upon the other inquiry whether Harrold sustained "serious injury" from the accident, which is the precise question which it is alleged in the complaint "was the only question litigated by the plaintiff" on the former trial.

The case falls directly within the principle of *Wood* agt. *Ross*, and the demurrer must be sustained.

It is claimed, however, that the allegation that Deyo and Barber testified that Harrold was confined to his bed after the accident, when, in truth, he was attending to his business in New York, presents a question not adjudicated upon the former

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trial. I do not think so. It is a piece of testimony bearing on the truth of the evidence of those witnesses given on the trial. It is not decisive of the extent of the injury sustained, and of itself is not necessarily inconsistent with "serious injury." It is cumulative testimony, insufficient, standing alone, to warrant granting a new trial, and affords no ground for equitable interference with the judgment.

Nor does it alter the case that this action is against other parties than Harrold. I fail to see the object of making Deyo and Barber parties to this suit. They are wholly unnecessary. The relief sought for could as well be granted if Harrold was the only party to the suit. No relief is asked for against either of them, and none could be properly asked for upon the allegations of the complaint. There is clearly no cause of action against Deyo and Barber, and if I am right in my construction of the complaint, none against Harrold. Since courts of law have exercised the power of granting new trials, the court of chancery rarely entertained jurisdiction of actions to set aside judgments obtained upon actual trials upon conflicting evidence. And under our system of practice, where the supreme court has general jurisdiction of law and equity, with power to relieve from unconscionable judgments on motion to the same extent as was formerly done by the court of chancery, a party who has litigated his case to the fullest extent possible in a common-law action cannot after his defeat become himself plaintiff, and under the guise of an equity suit in the same court, and perhaps before the same judge, compel a retrial of the same question litigated in the first trial. Such a practice is opposed to the general policy of our law. *Interest rei publicæ ut sit finis litium.*

I have not been referred to a single case where a court of equity has interfered to restrain the collection of a judgment obtained in a court of law after a trial on the merits upon conflicting testimony when the trial court had the power to grant a new trial, and I doubt if any such case can be cited.

Dobson agt. Pierce (12 N. Y., 157) was a case where there

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had been no trial, and the defendant had been induced not to defend the original action by the fraudulent representation of the plaintiff. *State of Michigan* agt. *Phoenix Bank* was a case where money had been obtained from the state on false pretense.

In *Truly* agt. *Warner* (5 How. [N. S.], 141) it was held that the facts did not make out a case for equitable relief. *Abonloff* agt. *Oppenheim* (*Alb. Law Jour.*, Jan. 20, 1883) was an action on a foreign judgment. Such a judgment is never conclusive between the parties, but is always open to be attacked for want of jurisdiction in the court rendering it or for fraud in obtaining it. None of the cases cited present the question involved here.

The case of the *United States* agt. *Throckmorton*, where the question arose on a demurrer to the complaint, presents as full discussion as any case of the question under consideration, and the rule is laid down as follows: "The cases in which relief has been granted are those in which, by fraud practiced upon the unsuccessful party, he has been prevented from fully exhibiting his case, by reason of which there has never been a real contest before the court on the subject-matter of the suit."

Apply that rule to this case. What was the subject-matter of the original suit? The complainant informs us that it was "the extent and permanency of Harrold's injuries;" but the plaintiff cannot say he was prevented from exhibiting his whole case on that issue, as the complaint informs us that that was "the only question litigated by the plaintiff," and it is nowhere claimed that the plaintiff has now any new evidence on that subject. Nor is it claimed that by any act of the defendants he was prevented from introducing all the evidence on that question that he could obtain. He has had his day in court, and must abide the result.

Quoting further from *United States* agt. *Throckmorton*, that learned court say: "When the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception

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practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or when the defendant never had knowledge of the suit, or when an attorney corruptly sells out his client's interests to the other side, these and similar cases which show there has never been a real contest or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul a former judgment. On the other hand, the doctrine is equally well settled that a court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually tried in the judgment assailed."

As examples of this principle among the cases in this state may be cited *Floyd agt. Jackson* (4 Johns. Ch. R., 279); *Huggins agt. King* (3 Barb., 316); *Smith agt. Lowery* (1 Johns. Ch. R. 320).

There is, however, another difficulty with this complaint: In the fourth paragraph it is alleged that on the trial of the former action "the plaintiff admitted in open court that Harrold was a passenger on the train, and was injured." There is no allegation that this admission was procured by fraud, or that it was induced by any act of the defendant's, nor is it alleged that it was not true. Even if it was not true the plaintiff could not now escape its force without showing that it was procured as the result of some fraudulent act on Harrold's part, and that is nowhere claimed or suggested.

It is necessarily implied from this admission that Harrold was entitled to some damages, and consequently to a judgment for some amount in that action, and it follows that the fraud and false swearing which are the corner-stones of this suit do not go to the judgment itself, but only to the excessive damages received. Such a case shows no ground for equitable relief (*Smith agt. Lowery*, 1 Johns. Ch. R., 320). Giving to this complaint the most liberal construction possible, it is plain that it presents for the trial the same question that was passed upon by the jury in the former action.

As such it presents no cause of action. At least it asks for

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no relief which could not be granted in the original suit and the plaintiff's remedy (if he has any) must lie in a motion for a new trial in the original action.

My conclusion is that as to Harrold it appears from the face of the complaint that the question which the plaintiff seeks to have tried has been conclusively determined in another action between the same parties.

That the facts stated do not make out a case for equitable relief, and that the complaint does not state a cause of action against any of the defendants.

The demurrer is sustained and judgment ordered for the defendants on the demurrer, with costs.

COURT OF APPEALS.

HEILMANN agt. LAZARUS.

Ejectment—Lease—When the question as to whether it is an inchoate, incomplete paper or not is to be decided by a jury as a question of fact—Charge of the judge thereon—Burthen of proof—What is a prima facie case—Extra allowance for costs—When no basis for it.

A contract under seal may be explained by parol evidence to vary its apparent expression, showing it was not the intention of the parties to do as written, when the words are capable of two different constructions. Where a lease was made containing a clause for the purchase of the property "as per special agreement signed in the same time with this lease," it is competent to show by parol evidence that the said clause is the special agreement referred to, and that no other or separate paper was to be signed at the same time. It is competent for the jury to find that no further agreement was contemplated at the time of the execution of the lease, and that the lease was a complete and perfect contract. The burden of the proof on the plaintiff is that of title and right of possession to the land ; this makes a *prima facie* case. It is not error to charge the jury that the lease is in form complete and signed by the parties, and it is needful for the defendant to establish his defense satisfactorily. This is not charging that the burden of proof is upon defendant to impeach the lease, nor is the burden of proof shifted ; it

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only means "there is necessity of evidence to answer the *prima facie* case or it will prevail."

Where the subject matter involved was the right of possession of real estate for two years subject to the rent reserved, and no money value of the right is shown, there is no basis for computation of an extra allowance.

Decided, November, 1882.

THIS was an action of ejectment tried at the circuit of the supreme court on the 28th day of October, 1880, before judge BEACH and a jury, to recover possession of the house and lot No. 331 East Forty-first street, New York city, under a lease for two years under seal made by the owner of the fee, Gustave Ramsperger, to the plaintiff for two years, from May 1, 1880, to May 1, 1882.

The defendant denied that he had "any knowledge or information sufficient to form a belief as to any and all of the allegations contained in the complaint herein, except that the defendant alleges that he is and has been in the lawful possession of the premises mentioned in the complaint herein since the 1st day of May, 1880."

On the trial, when the lease was offered in evidence properly acknowledged, the defendant objected, that the paper "appears upon its face to be an inchoate, incomplete paper; that there is no foundation laid for the admission of the paper, or any proof of title in Ramsperger; that it is not the whole contract between the parties." The objection was overruled, the defendant excepted and the paper was admitted and marked Exhibit B. It was the ordinary printed form of lease signed by the parties to it in the usual manner, and contained the following clause written in one of the blank spaces: "And it is further agreed between the parties to these presents that the party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to buy from the party of the first part the house and lot herein leased for the sum of eight thousand dollars, lawful money of the United States, as per special agreement signed at the same

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time with this lease; a sale of the property voids the lease, and can be effected any time during the term of the lease upon two months' previous notice given to the party of the first part by the party of the second part of his intention to effect the sale."

The defendant thereupon cross-examined plaintiff and he testified that he never had seen any special agreement or contract of sale and that only the lease and a copy had been drawn up or shown to him. In this he was corroborated by his brother and servant who were present when the lease was signed.

Plaintiff rested and defendant moved to dismiss the complaint on the same grounds above stated, as to the admission of the lease in evidence, and further that there was no mutuality of contract, as plaintiff had not bound himself to buy the house. The motion was denied and defendant excepted. The defendant called Gustave Ramsperger, the owner, who testified that at the time of signing the lease he brought with him a contract of sale in duplicate form for the premises, and that the same is the draft of the special agreement referred to in the lease.

That plaintiff, after the signing of the lease, refused to sign the contract of sale until he consulted a lawyer and took the copy contract for that purpose. Afterwards plaintiff said he would not sign it. He, Ramsperger, then rented the house to the defendant, who was then in possession under a lease from him expiring May 1, 1880. The plaintiff in rebuttal denied these statements.

The judge charged the jury, who rendered a verdict awarding the plaintiff the possession of the premises. The court granted the plaintiff an allowance of seventy-five dollars. The defendant excepted to the allowance as excessive, there being no basis upon which to fix such valuation, and entered the order granting the allowance. Defendant moved for a new trial upon the exceptions to the charge and taken upon the trial. The motion was denied and defendant excepted. The general

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term of the supreme court, first department, affirmed the judgment and the order, with costs, and the defendant appealed to the court of appeals.

Lewis Sanders, of counsel (*Sigismund Kaufman*, attorney), for appellant, argued the following points:

I. Whether the agreement was a complete contract or not depends upon the clause above quoted. The special agreement never was signed. Was there a complete contract? Here is an agreement to make a contract of sale by which the lease was to be voided which was never executed. The attempt is to dis sever so much of exhibit B as relates exclusively to a lease for two years from that part by which the lease is to be determined and the rent extinguished. But the terms of exhibit B preclude any such legal computation as mortal to the whole, as it provided that "a sale of the property voids the lease." A sale, how? Why, according to the terms of the special agreement signed at the same time with the lease. There is no absolute term of leasing for two years, for on compliance with the terms of the special agreement of sale the lease is *ipso facto* terminated. These two clauses are inter-dependent, and neither can be eliminated and leave an entire contract, nor can the court make an agreement of sale or lease between the parties. The most that can be claimed is that it is an agreement to make an agreement which has been uniformly held to be non-enforceable. The test is, could either party have maintained an action for specific performance? Contract evidenced by two or more papers they must all be construed together (*Meyer* agt. *Hunke*, 55 *N. Y.*, 416; *Brown* agt. *N. Y. Central R. R. Co.*, 44 *N. Y.*, 80; *Foot* agt. *Webb*, 59 *Barb.*, 52, 55; *Lindsay* agt. *Lynch*, 2 *Schoales & Lefroy*; *Potts* agt. *Whitehead*, 5 *C. E. Green*, 60). The paper called a lease is insusceptible of specific performance (*Stanton* agt. *Miller*, 58 *N. Y.*, 203; *Shakespeare* agt. *Markham*, 72 *N. Y.*, 407).

II. Before breach a contract under seal cannot be modified

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by parol (*Delarois* agt. *Buckley*, 13 *Wend.*, 71; *Allen* agt. *Jaguish*, 21 *Wend.*, 628; *Coe* agt. *Hobby*, 72 *N. Y.*, 148).

III. A deed referred to in another deed "is as if incorporated in it" (*Jackson* agt. *Parkhurst*, 4 *Wend.*, 369; *French* agt. *Carhart*, 1 *Comst.*, 96; *Hoppough* agt. *Strube*, 60 *N. Y.*, 433; *Marsh* agt. *Dodge*, 66 *N. Y.*, 588; *Whittelsey* agt. *Delaney*, 73 *N. Y.*, 575).

IV. The construction of a written instrument is a matter of law for the court. The plaintiff contends that the question as to whether or not the parties intended to execute another paper or not, or whether the paper, exhibit B, was a complete instrument, was tried as a question of fact and so submitted to the jury. If it had been so submitted it would have been clearly error. The court did not stultify itself. In his charge the learned judge said: "It is needful for the defendant to establish this defense to your satisfaction, because the plaintiff produces a lease which is in form complete and signed by the parties." The learned judge not only ruled exhibit B in as a perfect instrument in itself, but he charged the jury that it was "in form complete," and that it was for the defendant to show that it was not. If the charge had been directly the reverse of what it was there would have been ground for claiming that the jury had found as a fact that the instrument was complete, which question was not submitted to them as they were charged that it was complete as it stood. If the learned judge had submitted the instrument to the jury as a question of fact it would have been error (*The Arctic Fire Ins. Co.* agt. *Austin*, 69 *N. Y.*, 477).

V. The burden of proof was on the plaintiff. The plaintiff alleged title in himself; the defendant denied it. The burden of proving the fact was on plaintiff; the court charged the other way. In *Heineman* agt. *Hurd* (62 *N. Y.*, 455, 456) *CHURCH, C. J.*: "The burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and the burden remains throughout the trial." *Lamb* agt. *Camden and Amboy Railroad* (46 *N. Y.*,

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271) GROVER, J.: "The question of which party has the affirmative of an issue is in many cases very material as the case might be one in which the jury might hesitate in finding that the plaintiff had established the charge; and yet when they could not find that it had been satisfactorily answered" (*Banker agt. Banker*, 63 N. Y., 409).

VI. The respondent's contention that the jury have settled an issue of fact by their verdict against the defendant is of no force in view of the charge of the court that the burden of proof was upon the defendant to overturn the lease perfect in form.

VII. There was no basis for the extra allowance of seventy-five dollars (*Coates agt. Geddard*, 2 J. & S. [Sup. Ct.], 118; *Spofford agt. Texas Land Co.*, 9 J. & S. [Sup. Ct.], 228; *People agt. Albany S. R. R.*, 5 Lans., 25). This is estimating the value of a two years' lease, "the subject-matter involved" (Sec. 3253, *Code Civil Pro.*), at \$1,500 over and above the rental which plaintiff had to pay, which was \$1,700, together \$3,200; that is, that the house worth \$8,000 would rent for \$1,600 a year, or twenty per cent of its value; and the court will assume this without evidence. The complaint does not allege the lease to be of any value; and there is no profit if it had any value. The jury did not find that the possession of the premises were of any value. As a matter of law the rent reserved is equivalent for the lease as agreed upon between the parties. The lessee must pay the rent to enjoy the lease. The rental and the use of the premises are equal, and the lease had no value beyond the rent (*Kelley agt. Dutch Church of Schenectady*, 2 Hill, 116; *Kinney agt. Watts*, 4 Wend., 41).

George F. Langbein, for plaintiff, respondent, made and argued the following points:

I. Exhibit B, the lease, is a complete perfect paper on its face. As a lease it is a full, perfect and complete contract. It simply contains a further agreement, a special agreement

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for the sale and purchase of the house by the respondent from the appellant at the election of the respondent. The lease was the usual printed blank form, containing blank spaces. The parties filled up one of these with writing in making their special agreement. The owner, Mr. Ramsperger, a German, to save a lawyer's charges acted as his own lawyer, drew the lease and filled up the blank space with the agreement for the purchase and sale of the house, and therein called it a special agreement. There was no sale, and could be none, until the plaintiff elected to buy as contained in that special agreement; and he had such election at any time during two years upon giving two months' previous notice. It was an executory agreement of sale, conditioned upon the election of respondent as provided in it, contained in the lease. This is what the German meant by writing "as per special agreement, signed in the same time with this lease." The words are not, "to be signed at the same time with this lease," as if another paper was to be signed when the lease was signed, but the words are of the present "signed in" the same with this lease, meaning the execution of both the lease and the special agreement at the same time in signing the one paper, the lease. It was signed at or in the same time with the lease as it was embodied in it. Both the lease and the special agreement were signed at the same time by signing the one paper. Appellant could not have meant by the words "special agreement" the contract of sale, else he would have so written. He meant the executory agreement for the sale if plaintiff should elect to buy during the term. He was writing the special agreement to be signed with the lease; "signed in the same time with the lease;" as it was contained in the lease when it was signed. If respondent gave the notice of his intention to effect a sale, in accordance with this special agreement, he was to pay \$8,000 in cash, and the lease was void by being merged in the sale. He could not therefore mean the "contract of sale" by the words "special agreement," as respondent was not to buy until he gave

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notice of his election to buy, and he had within two months of two years to do that. The lease was to be void when the sale of the property was effected. If the respondent was to have a lease, and in the same time must effect a sale in order to have the lease, and the latter was to avoid the former, what was the use of going through the work of creating a lease? Such an understanding is inconsistent to what they signed under seal at the time. The intention of the parties is to be kept in view (*The Orphan Society agt. Waterbury*, 8 *Daly's R.*, 35). None of the cases cited by appellant's counsel are relevant to the case at bar. The contract of lease was complete and entirely mutual. What was left to be determined, or done, to complete it? Nothing. The executory or special agreement was also complete. The plaintiff was not bound to buy the house until he gave the notice of his election to do so, as stated. This was the mutual agreement between the parties.

II. Whether the lease was or was not the whole contract between the parties, or whether it was an incomplete, inchoate paper, or not, was raised as a question of fact by the appellant before the jury, and upon a conflict of evidence was decided by the jury against him.

III. The question of law raised was tried and decided as a question of fact by the jury. The question tried by the jury was whether there was a valid contract of lease, but that question depended as to whether another paper was to be executed. Appellant contended two different papers to be signed, perfected and constituted the agreement. Respondent contended this was not true as matter of fact, and the jury decided for the respondent. So that it was decided that the lease and the special agreement in it was the whole agreement, and was not to be evidenced by any further paper. The law could not be against the actual fact. Until the election to buy, and until a sale of the property, the lease remained in existence and in full force and effect. In *Lazarus agt. Heilmann* (11 *Abb. N. C.*, 93; also reported in 2 *N. Y. Civil Pro. R.*, 204) the

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court of common pleas for the city and county of New York, equity term, VAN HONSEN, J., in an action for waste, held the special agreement in the lease a complete, perfect contract, and compelled specific performance of the same on a counter-claim for that purpose.

IV. The justice did not charge as excepted to, and the exception is therefore of no avail. What he did charge was in fact the truth. The lease is in form complete. It was not a question of law as to the interpretation of a contract, but whether the contract had been completed or not by the decision of a fact, about which the parties contended. Defendant had the affirmative of the issue of fact that he raised on the trial. He claimed the lease was inchoate and not complete, because the fact was, another paper was to be executed before this was so. The burden of proof was upon him to show it, and thus impeach the lease. Appellant took no exception to the submission to the jury of the question of fact whether another paper was to be executed or not. He himself submitted his side of this question to the jury.

V. As to the allowance. The value of the subject-matter involved to the respondent, the lease, was \$700 for the first year and \$1,000 for the second year — \$1,700. Respondent had to pay this sum; it was the sum agreed between the parties, and it must, therefore, be taken as the value involved. The case was difficult and extraordinary, in view of the defense sprung upon the trial.

FINCH, J. — We do not discover in the lease under which plaintiff claims to obtain possession of the property in question the element of uncertainty upon which the defense is primarily founded. It purports to let the premises in dispute for the term of two years from the ensuing first day of May, at the yearly rent of \$700 for the first year and \$1,000 for the second, to be paid in equal monthly advance payments, and contains the ordinary and usual provisions for the protection of lessor and lessee. It has, however, a further provision,

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looking to the purchase of the property by the lessee, which is claimed to be imperfect and incomplete as an agreement of sale, and to infect with its own uncertainty the entire contract. The stipulation thus criticised is in these words, viz.: "The party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to buy from the party of the first part, the house and lot herein leased, for the sum of \$8,000 lawful money of the United States as per special agreement signed in the same time with this lease; a sale of the property voids the lease, and can be effected any time during the term of the lease upon two months' previous notice given to the party of the first part by the party of the second part of his intention to effect the sale." The operation of this provision is claimed to be rendered doubtful and uncertain by its reference to a "special agreement" contemplated to be concurrently executed. The argument at our bar developed a question of construction. The respondent contended that the "special agreement" referred to was not a separate and distinct contract, but the agreement for purchase and sale contained in the lease, and put stress upon the words "signed in" as well as the fact that the lease was drawn by the lessor himself, who was a German, somewhat awkward in the use of an unfamiliar language, and wholly inexperienced in the drawing of legal papers. The appellant, however, insists upon the more natural and obvious meaning, that the "special agreement" contemplated was one fixing the minor details of the contract of sale, and to be concurrently executed, so that the signing of the lease was merely provisional and conditional, and until the further instrument was executed no complete contract was made. But the lease as signed contained within itself, even as it respected the contract of sale, a complete and perfect agreement, if no reference had been made to a further settlement of details, or if such settlement and modification was waived. One agreed to buy and the other to sell. The price was fixed at \$8,000. It was to be paid in lawful money of the United States, and in legal effect,

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at the time of the consummation of the sale by the delivery of the deed, the time of conveyance and payment was fixed; it was to be during the continuance of the lease and upon two months' previous notice, but within those restrictions was at the option of the lessee. When made it avoided the lease. The agreement, therefore, in and of itself, had every element necessary to its completeness, and if at the time it was signed no further agreement was in any manner made or presented, claimed or insisted upon, the natural inference would be either that none was contemplated, because both parties understood the contract as respondent reads it, or that it was entirely waived, the parties resting upon the paper signed as a complete execution of their contract. Whether a contract was in fact executed, or only partially and incompletely executed, was therefore the question litigated, and to some extent was a question of fact. The paper actually signed was admissible, of course, for it tended to show the making of a complete and perfect contract, and was supplemented by the oath of the plaintiff that no other or further paper was executed at the same time, and no other was presented or shown to him. In this respect he was corroborated by two other witnesses present at the execution of the lease. At this point the defendant moved for a nonsuit, upon the ground that no completed contract had been executed and the plaintiff had not bound himself to buy. What we have said indicates that the motion was properly denied, for upon the facts it was competent for the jury to find that no further agreement was contemplated at the time of the execution of the lease. The defendant then gave rebutting evidence. He called the owner and lessor, who testified that a further paper specifying details and conditions of the contract of purchase was prepared and presented at the time of the execution of the lease; that plaintiff declined to sign it until he consulted a lawyer, and later refused entirely. If this was true the minds of the parties never met, and no completed contract was executed.

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The evidence having closed, the court charged, as matter of law, that the agreement signed was of a character sufficient, if perfected, to be valid and effectual; but whether or not a complete and perfected agreement was in truth made was a question of fact for the jury.

Apparently the learned counsel for the defendant meant to except to the proposition of the law laid down by the court. If he had done so, the exception would have been unavailing, for it is certainly true that the instrument on its face contained every necessary element of a complete and perfect contract. But the exception was inaccurate. It was taken to so much of the charge "as states that the lease produced by the plaintiff is a complete and executed instrument, as appears upon its face." The learned judge nowhere spoke of it as "completed and executed." He described it as complete on its face and "signed," but whether executed as a complete and perfected contract was precisely the question submitted to the jury. In the progress of the charge the court stated to the jury the evidence given on the part of the defendant, tending to show that a separate and special agreement was prepared, presented for execution and refused, and said: "If but one of these papers was executed, and under this understanding as detailed by Mr. Ramsperger, the other, for any reason whatsoever, was left unexecuted, the two papers together making the agreement, there would have been no complete agreement between the parties as to these premises." The learned judge, however, further said, adverting to defendant's version of the facts: "It is needful for the defendant to establish this defense to your satisfaction, because the plaintiff produces a lease which is in form complete and signed by the parties." It is claimed that this proposition was erroneous and was reached by defendant's exception "to that part of the charge which says that the burden of proof is on the defendant to impeach the lease." Nothing is said in the charge as to the burden of proof or about impeaching the lease. The issue as to which the burden of proof was on the plaintiff was that of title, of right to the

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possession of the land, and that the burden remained with him to the end. But the court was not speaking of that, nor of the burden of proof in connection with it. Attention was being directed to a conflict of evidence upon a question of fact arising under the main issue, and the language used can fairly be said to mean no more than that the plaintiff having made out a *prima facie* case the defendant must give some evidence to rebut it which the jury believe, or the *prima facie* case must prevail. In such cases it is sometimes, and perhaps inaccurately, said that the burden of proof is shifted.

In *Heineman* agt. *Hurd* (62 *N. Y.*, 455) it was observed that by such expression is only meant "that there is a necessity of evidence to answer the *prima facie* case or it will prevail." And the same thing was said in *Lamb* agt. *Chicago and Alton Railroad Company* (46 *N. Y.*, 279). Substantially that, and no more than that, was the evident meaning of the court in the present case, and we do not think it was intended or can be fairly construed to mean that the burden of the issue tendered by the complaint was upon the defendants. On the contrary, we think its fair construction is that the burden of proof was on the plaintiff; that he had borne it so far as to have made out a *prima facie* case, and that must prevail unless the defendant gave some evidence tending to rebut it which the jury could believe. The language of the charge might possibly bear a stronger construction; but even then it could not be justly said to have related to the burden of proof upon the issue of title. We do not think the jury were in any manner misled.

But the defendant also appeals from the order which gave to the plaintiff an extra allowance of seventy-five dollars. The subject-matter involved was the right of possession of the property for two years, subject to the rent reserved.

Whether that right had any money value was not shown. If the plaintiff succeeded he gained in money value only what the right of possession was worth over and above the rent which burdened it.

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If he lost, that and that only was the measure of loss. No basis, therefore, existed for the computation of an extra allowance and the order should be reversed (*People* agt. *Alb. and Susq. R. R.*, 45 *N. Y.*, 499; *Coates* agt. *Goddard*, 2 *J. & S.*, 118). The order, therefore, cannot be sustained and must be reversed, but the judgment should be affirmed.

All concur, except TRACY, J., absent.

Judgment affirmed, with costs, and order for extra allowance reversed, without costs.

SUPREME COURT.

THE PEOPLE *ex rel.* JOHN P. MASTERSON agt. ALBERT GALLUP, treasurer of Albany county.

Supervisors—local legislation by—Laws of 1875, chapter 482—Supervisors may create and give to county officers a clerk—County treasurer cannot resist payment on the ground of invalidity of the law.

A board of supervisors of a county may, under chapter 482 of the Laws of 1875, create and give to county officers a clerk.

The resolution of the board of supervisors of Albany county, creating and giving to the coroners of such county a clerk, and fixing his compensation, is not in violation of section 24 of article 3 of the Constitution, which forbids the legislature, common council of a city or the "board of supervisors" to grant any extra compensation to any public officer, servant, agent or contractor.

An officer who has received money raised by tax for a specific purpose, cannot successfully resist the payment of the money to the person for whom it was levied and collected, upon the ground that the local law under which it was obtained was invalid.

The supervisors having the power to pass the resolution, the want of a seal cannot affect their action.

Albany Special Term, February, 1883.

MOTION for a peremptory *mandamus* to compel the respondent, as county treasurer of Albany county, to pay salary to the relator as clerk to the coroners of the county.

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Peckham & Rosendale, for the relator.

M. T. Hun and *Matthew Hale*, opposed. .

WESTBROOK, *J.* — The relator, John P. Masterson, asks for a peremptory *mandamus* against Albert Gallup, treasurer of Albany county, to compel the latter to pay to the former \$100 for his salary as clerk to the coroners of Albany county during the month of January, 1883. The application is upon the following agreed statement of facts.

On December 21, 1882, a special committee of the board of supervisors of Albany county, to whom the matter had been referred, reported favorably this resolution :

“ *Resolved*, By the board of supervisors of the county of Albany, that hereafter there shall be one clerk only to coroners of the county of Albany, who shall receive a salary of one hundred dollars monthly, payable on the first day of each month by the county treasurer. Such clerk shall be appointed by the coroners of said county in the month of December of each year, by a written appointment signed by a majority of such coroners, and acknowledged by each coroner signing the same before some officer authorized to take the proof and acknowledgment of deeds within such county, and the same shall be filed in the clerk's office of said county. Such clerk shall hold his office for one year from such appointment, and until his successor is duly appointed. The office of the coroner shall be located in the rooms of the board of supervisors, and the duty of the clerk shall be to attend at such office during each week day, and to aid the coroners in the discharge of their duties, and to receive, preserve and file each inquisition and to keep a record of the same.

“ The foregoing resolution is passed by authority of chapter 482 of the Laws of 1875, subdivision second of section first.”

On the day of its presentation (December 2, 1882) the report was accepted, and under the rules of the board its con-

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sideration was postponed to the next day. On that day "it was taken up in the order of business devoted to the consideration of the matters reported by the several committees of the board." The resolution as recommended and contained in the report of the committee was then read by the clerk, and the chairman put the question thus: "All in favor of adopting the resolution will answer in the affirmative, those opposing in the negative." The clerk then called the roll of the members, entering the names of those voting in the affirmative and in the negative upon the journal; which resulted in nineteen votes in favor of its adoption and seven against it. Nineteen was a majority of all the members elected to the board. The resolution as passed, with the vote thereon, was duly entered upon the journal of the board.

A copy of such resolution having a *prefix* as follows: "No. 1. At a meeting of the board of supervisors of the county of Albany, held on Friday, December 22, 1882, the following was adopted," and the following *postscript*, "and was passed by a majority vote of all members elected to the board," and attested by the signature of "Edward A. Maher, president of the board of supervisors," and that of "Thomas H. Craven, clerk," but not by any official seal, there being in existence no official seal of the board of supervisors of Albany county, was filed in the office of, the clerk of Albany county during the month of December, 1882, and within a week of the close of the session of said board.

Within six weeks of the close of the session of said board of supervisors there was published in the newspapers in the county of Albany appointed to publish the session laws of the legislature the following:

NUMBER 1.

Proceedings of the Board of Supervisors.

At a meeting of the board of supervisors of Albany county, held at their rooms on Friday, December 22, 1882, the following resolution was adopted: A resolution prescribing the

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mode of appointment and the number of clerks to the coroners of Albany county and fixing the pay thereof:

Resolved, (by the board of supervisors of the county of Albany), That hereafter there shall be one clerk only to coroners of the county of Albany, who shall receive a salary of \$100 monthly, payable on the first day of each month by the county treasurer. Such clerk shall be appointed by the coroners of said county, in the month of December of each year, by a written appointment, signed by a majority of such coroners, and acknowledged by each coroner signing the same before some officer authorized to take the proof and acknowledgment of deeds within said county, and the same shall be filed in the clerk's office of said county. Such clerk shall hold his office for one year from such appointment, and until his successor is duly appointed. The office of the coroners shall be located in the rooms of the board of supervisors, and the duty of the clerk shall be to attend at such office during each week day, and to aid the coroners in the discharge of their duties, and to receive, preserve and file each inquisition, and to keep a record of the same. The foregoing resolution is passed by authority of chapter 482 of the Laws of 1875, subdivision 2 of section 1. And was passed by a majority vote of all members elected to the board. Edward A. Maher, president; Thomas H. Craven, clerk.

Pursuant to the resolution adopted by the board of supervisors, and in conformity with the form and manner therein prescribed, the relator, John P. Masterson, was by the coroners of Albany county elected on the 22d day of December, 1882, their clerk, for the term of one year from that date, and such appointment was filed in the office of the clerk of Albany county on the 29th day of December, 1882.

From the time of filing the appointment the relator has discharged the duties of clerk to the said coroners, and a few days after January 31, 1883, he demanded of the respondent Albert Gallup, the county treasurer of Albany county, the

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sum of \$100 in payment of his salary for that month, which payment was refused.

At the time of such demand there had been assessed upon and collected from the taxpayers of Albany county the sum of \$1,200 to pay the salary of the clerk appointed under the resolution, which sum was in the possession and under the control of the said Albert Gallup, as treasurer of the county, for that object.

The application for the *mandamus* is resisted upon two general grounds (though there are distinct and separate points made under each): First. That the supervisors had no power to pass the resolution; and, second. That in attempting to pass it they did not follow the requirements of the statute (*chap. 482 of the Laws of 1875*) under which they professed to act. The various points under these two general propositions which have been made in opposition to the application of the relator will now be examined.

First. It is argued that the statute, to which reference has just been made, did not authorize the board of supervisors of a county to create or give a clerk to any officer of the county, but "simply gave power to regulate the mode of appointment, &c., of deputies, clerks, &c., already in existence, or whose creation was especially authorized by law."

By section 1 of the said act "the boards of supervisors in the several counties of this state, except in cities whose boundaries are the same as those of the county," were vested with "further powers of local legislation and administration," and empowered "to make and administer within their respective counties laws and regulations as follows: * * * 2. To fix, subject to the limitations of section fifteen, article six of the Constitution, the salaries and *per diem* allowance of county officers whose compensation may be a county charge, and which shall not be changed during the term of office of such officers, respectively, and to prescribe the mode of appointment and fix the number, grades and pay of the deputies, clerks and subordinate employes in such offices."

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If, as the objection concedes may be done, a board of supervisors may, when clerks are allowed by a general law of the state to a county, "prescribe the mode of appointment;" that is to say, change the mode of appointment and "fix the number, grade and pay" of such clerks; that is to say, enlarge or reduce their number, change their grade and pay, is it not a technical construction of the language employed which limits the power of the supervisors only to such clerks as general statutes authorize? Nay, does not the argument defeat itself? It surely is more reasonable to suppose that it was intended rather to confer the power of creating a clerkship than to give the right to change the mode of appointment, abolish, reduce or enlarge the number of clerks and increase or decrease the compensation when they had been established by general statutes. The former involves no repeal of legislative enactments while the latter does. If a clerkship created by general law may be abolished by the supervisors, why cannot one be created? And if two clerks can be given by them to a county officer when only one was before authorized, why may they not give one to any official who was previously without any? The power exerted in either case is precisely of the same character, and there does not seem to be any sufficient reason so to construe the statute as to confer the right of legislation in the one case and yet to withhold it in the other. The fact is that a power to "fix the number" of clerks which a county officer may have must and does carry with it the authority of giving or withholding clerks according to the judgment of the body upon whom that power is conferred. In declaring, then, that the coroners of Albany county should have one clerk the supervisors did that which the statute authorized them to do, to wit, "fix the number" of the clerks which such officials should have.

It was argued that such a construction would place it in the power of boards of supervisors to increase the number of employes. That is true, and it is equally true of the construction maintained in behalf of the respondent; but it is also true that all power may be abused, and therefore may be

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more safely confided to a body of men directly responsible to a constituency which can speedily undo bad legislation than to a body, the legislature for instance, over whom the parties affected have very little control. It was precisely this argument which induced the adoption of section 23 of article 3 of our State Constitution, requiring the legislature to confer by general laws "upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as the legislature may from time to time deem expedient;" and it was also the same reasoning, as well as the constitutional command, which produced chapter 482 of the Laws of 1875, the title of which is, "An act to confer on boards of supervisors further powers of local legislation and administration, and to regulate the compensation of supervisors." As a fact, it is well known that certain officers of counties need clerks, and no sound reason can be given, why the power of creating them should exist in a body over a large majority of whose members the taxpayers affected have no control. A statute of this character should receive a construction in harmony with its evident intent. In construing the law under consideration, we are to bear in mind what the chief executive of the state has recently, in a veto message, well said in regard to it: "The act referred to was passed, as its title declares, 'to confer upon boards of supervisors further powers of local legislation and administration,' and with the intent that the matters therein specified, being of local interest and importance, should be disposed of by an authority nearer home than the legislature of the state." In holding that this statute, by which boards of supervisors are authorized to "fix the number" of clerks to a county officer, confers upon them the power to give or withhold, and to increase or diminish the number of clerks to county officers, we construe it in harmony with the constitutional mandate, the object of the act of 1875, as declared in its title, and of that sound policy which requires power to be exercised by those over whom the community affected has direct control.

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Second. It is claimed that the resolution is illegal because it directs the clerk to see that the inquisitions, &c., are filed, which is said to be inconsistent with section 778 of the Code of Criminal Procedure, because, as has been argued, the coroners are required personally to file them.

This objection, though specious, is unsound. So much of official duty as involves the judgment and discretion of an officer he must personally do, but he is not bound to perform and do in person all details of merely clerical work. A statute may make it the duty of a judge to file certain papers, but it was never doubted that if he sent his clerk with a document to the proper office for filing, that such a discharge of duty was illegal, or the filing a nullity. A clerk acts under the direction of the officer he is employed to assist, and it would be a most strained conclusion, that because the clerk of the coroners was directed to do certain clerical work in aid of their duties by the resolution creating him, that, therefore, the act of creation was void, although what he was directed to do could properly have been done by him if a coroner had personally requested it. The resolution does not require the clerk of the coroners to file the inquisitions in any particular place. If the general law of the state makes their filing in the clerk's office of the county a necessity, the resolution of the supervisors should receive a construction making the filing there the duty of the clerk. Courts are not to be astute in construing language so as to nullify legislation, but the precise contrary is their duty when the expression used is of doubtful import.

Third. It is insisted that the resolution violates section 24 of article 3 of the Constitution, which forbids the legislature, the common council of a city or the board of supervisors "to grant any extra compensation to any public officer, servant, agent or contractor."

To this argument it may be summarily said, that it is, at least, somewhat novel. It has not been hitherto supposed that if an officer was given a clerk, that the officer himself

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received "extra compensation;" if he does, it would be difficult to demonstrate it. The practical construction of the constitution for many years, as well as reason, forbids the acceptance of the objection as sound.

An examination of the various objections made to the power which the supervisors of Albany county have exercised in giving to the coroners of such county a clerk, leads to the conclusion that neither is maintainable. It remains to be shown that the several propositions of the respondent, under the second general proposition, "that the supervisors did not follow the requirements of the statute (*chap. 482 of the Laws of 1875*) under which they professed to act," are equally untenable.

First. It is argued that the resolution was never passed because in form it was not written on a distinct and separate piece of paper, but was offered as contained in the report of the committee, and that this was simply the adoption of a report of a committee.

The act of 1875 does not require or prescribe any form of enactment. The report of the committee recommended the adoption of a resolution which was written out. After accepting the report, the board fixed upon a time to consider it. When it reassembled it had before it a written resolution offered by a committee of its members. That resolution was read and the chairman put the question: "All in favor of adopting the resolution will answer in the affirmative, those opposed in the negative." The proceeding could not have been misunderstood; each member, as his name was called, responded, and the result was nineteen votes in the affirmative and seven in the negative. The resolution, precisely as read, was entered upon the journal and the vote duly recorded. It is difficult to see what more was needed or required to make the action effective. Certainly nothing in the statute requires more, and for a court to insert words therein would be judicial legislation.

Second. The remaining objections relate to omissions subse-

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quent to the adoption, and cannot affect the enactment itself, which became valid by the vote.

This is apparent by the second section of the act, which prescribes what shall further be done with "every resolution adopted in pursuance of this act." It must then, that is after adoption, "be prefixed by a proper title concisely expressing contents," &c., and then certified and filed and published. All this has been done in the precise form required by the statute, except that the copy filed with the county clerk was not under the seal of the board, because it had none. Very plainly all these provisions are directory. The validity of the act depended upon the will of the supervisors, duly expressed in proper form and passed by a legal majority. Whether the board had or had not a seal, and therefore could or could not certify to their action under seal, was of no consequence. That was directory only, and as the statute does not declare action void unless all subsequent steps had been complied with, it may properly be said, as was said by the court of appeals, per WILLARD, J., in *The People agt. The Supervisors of Chenango* (8 N. Y., 317-328), when it was argued that a law was void because a certain provision of the constitution was not complied with in its enactment, "there is no clause declaring the act to be void if this direction is not followed. It does not stand on the same footing with the requirement of a certain number to form a quorum or to pass a bill (*See, also, People agt. Board of Supervisors of Orange*, 27 Barb., 584; and *People agt. Supervisors of Ulster county*, 34 N. Y., 268, 272, 273, etc.)." The supervisors having the power to pass the resolution, the want of a seal could not affect their action any more than their ability and wisdom as legislators could possibly depend upon the possession of any such instrument.

In overruling the second general proposition also, and in directing the issue of the *mandamus* as asked, the argument urged to the court that Mr. Masterson has no duties to discharged will not be answered by the attempt to show that he

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has. That question was for the supervisors. Courts are not to declare void legislative enactments or constitutional requirements according to their views of what statute or constitutional legislation should be. The creature is not above the creator, and should not undertake the impossible task of usurping his functions. Judicial interpretation should seek for the intent of the body or the individual whose language is to be construed. If the words employed are not of doubtful import, they should be construed as they read; and if capable of more than one construction, he whose duty it is to interpret their meaning should not seek to find ingenious arguments to sustain an interpretation harmonizing with his own views of what ought to have been said, but he should endeavor, if possible, to ascertain and give effect to the intention of those whose will and desire should control the decision of the question submitted.

In closing this opinion it is proper to refer to another point which the facts of this case present. The question which this proceeding involves is not, shall an enactment made without authority be enforced, but it is this, shall a mere custodian of moneys collected from taxpayers for a specific purpose; under color at least of law, be allowed to hold them from the very object for which they were collected, and for which they were received by him? Mr. Masterson asks that the respondent shall pay moneys which the taxpayers of Albany county have placed in the hands of the latter for that very purpose. The county treasurer of Albany county is the officer or agent of its people. The money which the relator seeks, the respondent holds for the purpose of making such payment, and for no other. An order requiring such payment to be made will devote it to the very purpose for which it was collected, and the officer who is directed to pay can have no cause of complaint, that the judgment of this court compels the performance of a trust and a duty which, by the act of receiving the money now sought, he voluntarily accepted. In *First National Bank agt Wheeler et al.* (72 N. Y., 201) it was held that "rail-

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road commissioners of a town, who have received from the collector of the town moneys raised by tax to pay interest coupons on bonds of the town, issued in payment of a subscription to the capital stock of a railroad, cannot draw in question the validity of the bonds to justify them in refusing to pay over the moneys to the owners of the coupons;” and “the fact that the commissioners resist payment and defend an action against them by the holder of such coupons pursuant to a resolution of a town meeting and under a promise of indemnity from the town, does not make the invalidity of the bonds a defense to the action.” The same principle was also held at a date earlier than that of the decision just referred to by the judge writing this opinion in *People ex rel. New York and Hudson River Railroad Company agt. Havemeyer* (47 *How.*, 494; see pages 516, 517), and it is exactly applicable to the present proceeding. The respondent has no defense to the present motion, even though the resolution of the supervisors was invalid. He has received the money to pay Mr. Masterson, and he must do that which by implication at least he has promised to do.

The order for a peremptory *mandamus* must be granted.

SUPREME COURT.

In the Matter of the Application of WILLIAM W. WRIGHT,
CONANT FOSTER and HENRY H. WALKER.

Bicycles in parks — Power of commissioners of Central Park to prohibit their use therein — Habeas corpus — Supreme court no jurisdiction on habeas corpus after conviction in criminal cases, to retry questions of fact — Office of the writ.

An ordinance enacted by the commissioners of Central Park that “no bicycle or tricycle be allowed in Central or city parks,” is within the discretionary power of the commissioners, and it cannot be held, as matter of fact or law, to be unreasonable.

The supreme court has no jurisdiction on *habeas corpus*, after conviction

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in criminal cases, to retry questions of fact upon which the correctness of the judgment of the court in which the petitioner was convicted depends; so that the question of the reasonableness or unreasonableness of the ordinance, so far as it depended on questions of fact, passed upon by the police justice, could only be reviewed on appeal or writ of *certiorari* by the appellate court having jurisdiction to hear such appeals (*Affirming S. C.*, 63 *How.* 345).

First Department, General Term, March, 1883.

Before DAVIS, P. J., DANIELS and MACOMBER, JJ.

APPEAL from order of special term dismissing several writs of *habeas corpus*, and remanding appellants severally to the custody of the warden of the city prison.

Edmund Wetmore, for the appellants.

George P. Andrews, for the respondents.

DAVIS, P. J. — In disposing of the several writs of *habeas corpus* in the court below the following opinion was pronounced by the court (*See opinion of LAWRENCE, J., reported in 63 How.*, 345). After quoting the entire opinion the judge says:

We concur in the reasoning and conclusions of this opinion and in the correctness of the order remanding the prisoners.

We think also that the writs should have been dismissed and the prisoners remanded without proceeding to the trial of the question as one of fact, whether the ordinance was or was not a reasonable one.

The court has no jurisdiction on *habeas corpus* after convictions in criminal cases to retry questions of fact upon which the correctness of the judgment of the court in which the petitioner was convicted depends. Such questions must be tried and determined by the court having jurisdiction to try the alleged offense. So far as the reasonableness or unreasonableness of the ordinance depended on questions of

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fact, the place for their trial was the court of the police justice, and the judgment of that court could only be reviewed on appeal or writ of *certiorari* by the appellate court having jurisdiction to hear such appeals.

The return to the writ of *habeas corpus* in these cases showed nothing more than the commitment issued by the police justice. They recited the arrest, trial and judgment of the court convicting the petitioners of violating the ordinance. No question was made as to their sufficiency of form. None of the proceedings had before the police justice were brought up, and it must be assumed that the trial was in all respects regular. The traverse simply presented the fact that the ordinance so violated was one enacted by the park commissioners prohibiting the use of bicycles in the Central Park, and alleging that such ordinance was unreasonable and void by reason of the fact set forth in the petition. It is not the province of the writ of *habeas corpus* to retry any questions of fact upon which the findings of the court of original jurisdiction must be presumed to have been predicated. And unless it appear as matter of law that the ordinance is void, it is the duty of the magistrate to remand the petitioner, leaving him to his remedy of review by appropriate proceedings. A very erroneous impression of the purpose and office of the writ of *habeas corpus* seems to be rapidly perverting it from a writ of relief from unlawful imprisonment to one of review for the retrial of questions of fact, or the reconsideration of questions of law, clearly within the jurisdiction of the court or officer who has passed upon the case and committed the accused. In this case the retrial of the question of the reasonableness of the ordinance as one depending upon facts has occupied a long time and the evidence extends through several hundred printed pages.

The opinion of the learned judge at special term has correctly disposed of all the questions, and our reference to the practice is only needed to enable us to disapprove of the unnecessary and illegal course often taken in proceedings

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where petitioners have been tried or examined and committed by courts having jurisdiction of both the person and subject matter.

The orders should be affirmed.

DANIELS, J., concurs.

SUPREME COURT.

GEORGE W. HOWARD *et al.* agt. SAMUEL D. BARNES *et al.*

Will—construction of—Gift of the whole residuary estate to two persons named, one of whom dies before the testator—Effect of such death.

Where the testator gave the residue of his estate to his brother and sister, "their heirs, executors, administrators and assigns," and the brother died before the testator, leaving children, but the sister survived him:

Held, that the gift being of the whole residuary estate to the two persons named and not a share of it to each, the sister who survived the testator by force of the will itself took the whole property. The words "their heirs, executors and assigns" being mere words of limitation and not of purchase, do not have the effect of substituting the heirs of the brother in place of their ancestor upon his death, and do not affect the application of the rule that as the brother and sister take as a class, the survivor, in the event of the death of one of the beneficiaries in the testator's lifetime, takes the whole.

Special Term, May, 1882.

A. H. Nones, for plaintiff.

Sackett, Lang & Reed, for defendant.

VAN VORST, J.—One clause only of the last will and testament of Bethnel Howard, deceased, is presented for construction, and that is in these words: "6th. The residue and remainder of my estate, real and personal, I give and bequeath to my brother Samuel Howard and my sister Anna Talbot, their heirs, executors, administrators and assigns."

Samuel Howard, one of the persons named, died before the testator, leaving children, but Anna Talbot survived him,

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and the question is now presented as to what effect the death of Samuel Howard in the testator's lifetime had upon the gift of the residuary estate?

On the one hand the children of Samuel Howard claim the interest given to their father, and on the other hand those who represent Anna Talbot, who has died since the decease of the testator, claim the entire estate. It will be observed that the gift to these persons is not a share of the residuary estate to each, but the whole is given to the two persons named with the added words "their heirs, executors, administrators and assigns."

In the case of a simple, unqualified gift of an entire fund to two or more persons, and one should die in the testator's lifetime, the rule is that the survivor or survivors take the whole fund to the exclusion of those who represent the deceased person.

To save a lapse the Revised Statutes have provided that where the legatee is a child or descendant of the testator, and dying in the testator's lifetime, shall leave a child or other descendant who survives the testator, the legacy shall not lapse, but that the property shall vest in the surviving child or other descendant of the legatee (2 *R. S.*, 66, *sec.* 52). But Samuel Howard was a brother and not a descendant of the testator (*Van Buren v. Dash*, 30 *N. Y.*, 393). This is not, however, in strictness a question of lapse, for by the construction which under the cases we feel justified in giving this clause of the will, Anna Talbot, who survived the testator, by force of the will itself took the whole property. As a will operates only from the death of the testator, gifts thereby intended sometimes wholly fail through the death of a beneficiary in the testator's lifetime.

Immediate gifts which take effect in possession at testator's death benefit only those who can claim an interest at the death of the testator. "Where there is a devise or bequests to a plurality of persons as joint tenants, no lapse can occur unless all the objects die in the testator's lifetime; any of them exist-

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ing when the will takes effect will be entitled to the entire property" (1 *Jarman on Wills*, 341).

In the clause under consideration the gift must be regarded as made to the brother and sister of the testator jointly. "Each is a taker of the whole, but not wholly and solely."

The brother and sister take as a class, and the rule that the survivor, in the event that one of the beneficiaries should die in the testator's lifetime, takes the whole, applies (*Gardner* agt. *Printup*, 2 *Barb.*, 83; *Magaw* agt. *Field*, 48 *N. Y.*, 668; and see *Hoppock* agt. *Sucker*, 59 *N. Y.*, 202; *Downing* agt. *Marshall*, 23 *N. Y.*, 373).

But it is urged on the behalf of the descendants of Samuel Howard that effect should be given to the words "their heirs, executors and assigns," and that by force of those words, upon the death of their ancestor, they were substituted in his place and took the share intended for him. But it has been repeatedly decided that these are mere words of limitation and not of purchase (*Van Beuren* agt. *Dash*, *supra*; *Thurber* agt. *Chambers*, 66 *N. Y.*, 42; *Gill* agt. *Brower*, 37 *N. Y.*, 549; *Jarman on Wills* [vol. 1], 338).

From a careful examination of the whole will, I can discover nothing from which it can be inferred that the testator had any designs with respect to the ultimate disposition and enjoyment of his residuary estate, other than that which the words of the clause in question, according to their accustomed legal interpretation, suggest. He has used no words of severance in the gift, and has indicated no intention on his part that the descendants of either brother or sister, dying in his lifetime, should be substituted in the place of the one so dying. Had that been intended, it could have been readily accomplished. And whilst the court can construe, it cannot make a will, nor can it, under the guise of interpretation, dispose of the property otherwise than as the testator intended, unless the disposition made transgresses the law.

The presumption, therefore, is that the testator intended that if his brother or sister should die in his lifetime, that the

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survivor should take the entire gift. The brother and sister were nearer to him than their possible descendants, and would be naturally preferred in the disposition he might make. And, besides, some of the children of Samuel Howard received specific gifts from the testator under the will, and it is highly probable that whatever benefit he intended that they should receive personally from his estate he had himself, with care, provided.

The result, therefore reached, is that those claiming through Anna Talbot take the entire residuary estate. A question has been presented with respect to the second clause of the will in these words: "I give to my niece Helen Howard, in consideration of services rendered, the sum of two thousand dollars. Helen Howard died in the testator's lifetime, and the point raised is whether the bequest, made "in consideration of services," lapsed.

There is no real occasion to pass upon that question here. It is one arising in the administration of the estate, and to be adjusted in the surrogate's court, preliminary to a distribution. There it can be determined in an appropriate way as to whether the claimed indebtedness had been paid in the testator's lifetime, or was outstanding at his death. In no event can it be decided here, as the proper parties to be affected by the determination are not before the court.

Brown agt. Cooper.

N. Y. SUPERIOR COURT.

JOSEPH H. BROWN agt. HENRY PROUSE COOPER.

Sheriff's fees — Agreement to pay keeper's fees — When will be enforced.

A contract made between the sheriff and defendant's attorney, whereby the latter agreed to pay keeper's fees and incidental expenses, provided the property levied upon under attachment was permitted to remain intact in defendant's stores, is valid and binding.

Moneys paid the sheriff under such an agreement are not fees, and are not subject to taxation.

Special Term, May, 1883.

ON a motion to tax sheriff's fees on an attachment, defendant alleged that larger sums of money had been claimed by, and paid to, the sheriff during his (defendant's) absence in Europe, and insisted that such moneys were paid as fees; that such fees were illegal and were liable to taxation. The sheriff alleged that after making a levy the attorney of defendant, in order to protect the property from being disturbed in the stores, agreed to pay costs and expenses for preservation of said property, if it were allowed to remain intact. In pursuance of such agreement certain sums of money were paid to him from time to time, not as fees, but for the payment of keeper's fees and other expenses incidental to keeping the property of defendant in his or his agent's hands.

W. H. Leonard, for defendant.

Edward J. Cramer, for the sheriff.

SEDGWICK, C. J. — No fees have been charged or collected. The money paid was for expenses under an agreement by defendant's attorney, which, on the papers, was not invalid. The papers show no facts that tend to the conclusion that defendant is not bound by the agreement

Motion denied; ten dollars costs.

Lang agt. Marks.

N. Y. COMMON PLEAS.

PETER LANG and others, respondents, agt. ISAAC MARKS,
appellant.

Attachment — Appeal — District courts — Manner of granting attachments in district courts — Upon appeal to common pleas from a district court judgment all proceedings before the justice may be reviewed — Code of Civil Procedure, sections 2917, 8211.

Under the new Code, as before, the decision of a district court justice upon motion to vacate an attachment which had been previously issued in the action may be reviewed on appeal.

The Code has made no change in the manner of granting an attachment in a district court, and the attachment must be allowed by the justice and signed by the clerk.

General Term, May, 1883.

Aaron Levy, for defendant, appellant.

Mr. Lindsay, for plaintiff, respondent.

VAN BRUNT, *J.* — The main question which it is necessary to decide in disposing of this appeal seems to be this: Upon an appeal to this court from a district court in the city of New York, can this court review the decision of the justice denying a motion to vacate an attachment issued against property which had been previously issued in the action? Unless it can, then no matter how erroneous the proceeding of a justice may have been in the issuing or sustaining an attachment the defendant is wholly without remedy. Under the practice prior to the new Code it was well settled that upon an appeal from a judgment the proceedings of an attachment so issued could be reviewed upon an appeal from the judgment.

It is urged, and there is great force in the suggestion, that under the practice before the new Code, where an attachment

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was issued, it was the process by which the action was commenced and, therefore, properly came before the appellate court as part of the record showing how the court acquired jurisdiction, but that under the new Code the court does not acquire jurisdiction by the attachment but by the service of the summons; and even though the attachment be vacated the court may proceed to judgment in case of a general appearance of the defendant, or a personal service of a summons upon him (*sec. 2917*), thus making the attachment simply a provisional remedy as in courts of record. But when we consider that section 3211 of the new Code especially provides that no change in the manner of applying for, granting and executing a warrant of attachment, and the proceedings thereupon is intended to be made, unless the statute under which those proceedings are regulated is expressly repealed, it is clear that no change whatever in any respect was made in the old statute, except that an action must always be commenced by summons. Under the practice existing at the time of the adoption of the Code, under the then existing statutes the proceedings upon attachment could be reviewed upon appeal, and the language above shows a manifest intent not to disturb the practice in any respect by implication.

It would appear, therefore, that on appeal from the judgment all the proceedings before the justice are brought up as before. The objection that the attachment was not allowed by the justice and signed by the clerk seems to be fatal. The attachment is signed by the justice as if it was issued under the Code, but as the Code has made no change in the manner of granting an attachment it should have been allowed by the justice and signed by the clerk.

Judgment must be reversed.

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N. Y. COMMON PLEAS.

In the Matter of the Accounting of WILLIAM H. BURBANK,
assignee, &c.

Assignees — accounting of — Costs and allowances — What allowances to be made for legal action or assistance in the discharge of their duties.

The rules which prevail in regard to allowances to trustees, to reimburse them for expenses necessarily incurred in the execution of their trusts, apply to assignees for benefit of creditors.

In the ordinary performance of such duties as an assignee for the benefit of creditors assumes, he at least engages his own personal competency to perform them, and he cannot involve the estate in the expense of employing counsel to advise him as to duties he has thus assumed, unless it were shown that some unusual complications existed which rendered it reasonable and proper that professional advice should be called in to extricate or alleviate the affairs of the assigned estate from some unanticipated complications.

An assignee will not be allowed, at the expense of the estate, to retain a lawyer, as one among other employes that he may necessarily employ, for the purpose of affording him general advice as to his conduct in his office as trustee. The special exigency and reasonable necessity for the incurring of any such expense in the execution of the trust, must, in all cases, be shown.

Preparing the inventory of the property and the schedules of the debtors and creditors, the advertising, attending the auction sale, &c., are services which the assignee is bound to render himself, and if he employs an attorney to perform the services an allowance will not be made to the attorney out of the estate.

In this case there was allowed for preparing the order, &c., to advertise for creditors, ten dollars; for the citation for creditors to appear and prove their claims, twenty-five dollars, and for the papers requisite on the final accounting and the decree of discharge, twenty-five dollars.

No allowance can be made for the legal services by a lawyer upon an accounting, except where claims are litigated; but where, as in this case, the claims are simply submitted with the vouchers of the expenditures, all that is requisite upon the accounting must be done by the assignee and the referee, who, in such a proceeding, discharges the duty simply of an accountant in the examination of the accounts, with the right to take proof and try the question where claims are disputed, and the investigation assumes more or less of a trial.

Special Term, May, 1883.

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DALY, C. J. — The estate on the final accounting amounts to \$4,050.94, and the attorney employed by the assignee asks to be allowed out of the estate \$500 for his services. The referee's bill is \$125. Objection is made by the assignee both to the allowance asked by the attorney and to the referee's bill.

As to the referee's bill, being objected to it will have to be taxed by the clerk in the ordinary way on the proper proofs.

The attorney claims that he is entitled to \$150 for legal services in defending three actions of replevin, one of which was tried in a district justice's court, and the other two were settled after putting in answers, in all of which the assignee succeeded. There is nothing but the attorney's estimate of the value of his services in these three suits, which will not suffice. He should have shown before the referee what services he rendered in these actions, so that the referee might pass upon and find the value of the services on his final accounting, if they are to be allowed as an expense incurred. As respects the further claim of \$350, he submits an extract from his register from October 1, 1881, to April 21, 1883, to show the services rendered by him. It begins with the drawing of the assignment and ends with the preparation of the order appointing a referee to take the final accounting. As respects the drawing of the assignment, his affidavit shows that he was paid \$230 by the assignee before drawing it, for advice and services in and about preparing the assignment and for other business done by the assignee previous to the assignment. So that as respects the services of preparing the assignment he has been paid for it, even if it should be regarded as an expenditure that could be imposed on the assigned estate. The other entries from the registry show that everything that was done under the assignment was done by him and not by the assignee; and he stated orally upon hearing that he gave his time for two days in attending the auction sale of the goods, which consisted of the contents of a shoe store. The other charges, with the exception of the

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instances in which application had to be made to the court in the formal proceedings required by law, and in which the services of an attorney may be necessary, are for services which the assignee was bound to render himself, such as preparing the inventory of the property and the schedules of the debtors and creditors, the advertising, attending the auction sale, &c.; and if the assignee employed him to render such services as these, for the performance of which it was not necessary to have the services of a lawyer, he must look to the assignee for his compensation. Among these charges are twelve days spent in preparing the inventory and time spent in trying to effect an agreement for composition.

The rules which prevail in regard to allowances to trustees to reimburse them for expenses necessarily incurred in the execution of their trust apply to assignees in these proceedings. Like other trustees, they are allowed reasonable fees paid for legal advice or assistance in the discharge of their duties, such allowances for legal expenses being always, however, within the discretion of the court, and they will be reduced if in the judgment of the court they are unreasonable. So also they may, like other trustees, employ agents, collectors, accountants and other persons, where such services are necessary, and an allowance will be made for such expenditure (*Perry on Trustees*, secs. 910, 912).

It was held by my late colleague, judge ROBINSON, in *Levy's Accounting* (2 Abb. N. C., 182): "In the ordinary performance of such duties as an assignee for the benefit of creditors assumes, he at least engages his own personal competency to perform them, and he cannot involve the estate in the expense of employing counsel to advise him as to duties he has thus assumed unless it were shown that some unusual complications existed which rendered it reasonable and proper that professional advice should be called in to extricate or alleviate the affairs of the assigned estate from some unanticipated complications. No such convenient rule exists as enables an assignee, at the expense of the estate, to retain

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a lawyer, as one among other employes that he may necessarily employ, for the purpose of affording him general advice as to his conduct in his office as trustee. The special exigency and reasonable necessity for the incurring of any such expense in the execution of the trust must, in all cases, be shown."

The court will recognize that the services of a lawyer are necessary in drawing the formal papers that have to be presented to the court in the different stages of the proceedings, as they must be carefully prepared to comply with the provisions of the statute regulating voluntary assignments, and with the rules of the court. They are, in most cases, mere formal papers which do not require either much labor or any great professional skill in their preparation, involving little else than a due observance of the provisions of the statute and the rules of the court. The papers here were simply of this formal character, the estate being a small one and its affairs in no way complicated or difficult. There will be allowed, therefore, for preparing the order, &c., to advertise for creditors, ten dollars; for the citation of creditors to appear and prove their claims, twenty-five dollars; for the papers requisite on the final accounting, and the decree of discharge, twenty-five dollars. No allowance can be made for the legal services by a lawyer upon an accounting, except where claims are litigated; but where, as in this case, the claims are simply submitted with the vouchers of the expenditures, all that is requisite upon the accounting must be done by the assignee and the referee who, in such a proceeding, discharges the duty simply of an accountant in the examination of the accounts, with the right to take proof and try the question where claims are disputed, and the investigation assumes more or less of the character of a trial. Nothing of that nature existed here. There was no contest on the part of any creditor, and the accounting was merely a formal proceeding. There may be cases where the preparation of schedules, such as inventory of the assets and schedules of the debtors and creditors, involves such investi-

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gation and labor as to require the employment of a clerk or accountant; and where such is the case the estate will be charged with the expenditure thus incurred. But there was nothing of this kind in this case. There was no occasion to employ a lawyer who, according to his own account, spent ten days in preparing the schedules and inventory, which, after the examination of the schedules, must have arisen because he was not familiar with matters of account, and it therefore took him a long time to do what an ordinary accountant could do in a very short time. In my judgment, the assignee himself could have prepared these inventories and schedules, and if assignees cannot perform ordinary duties of this kind, they should not accept such a trust. Sixty dollars, therefore, for the legal services rendered by the attorney in these proceedings is all that can be allowed, instead of \$350, which is asked for, and this sixty dollars is allowed simply as necessary disbursements.

His additional claim of \$150 must await the further examination and report of the referee.

SUPREME COURT.

In the Matter of the Application of the HARTFORD AND CONNECTICUT WESTERN RAILROAD COMPANY for a commission to value lands for railroad purposes.

Railroad — Condemnation of land for railroad purposes — What interest or estate in property can or must a railroad corporation acquire by condemnation under the statutes.

Under the general railroad act of this state, a corporation, by proceedings thereunder, does not acquire the fee of the land condemned, but only the right of "use * * * for the purposes of its incorporation during the continuance of its corporate existence." Its acquisitions must therefore be limited to its corporate needs; and an objection to a petition asking for a commission to appraise property needed for the

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location of a railway, that it specifies only the surface use thereof as that to be acquired—the description being drawn in that form to avoid the payment for iron ore supposed to be below the surface—is not well taken, and must be overruled.

Ulster Special Term, January, 1883.

Peter Cantine, for application.

G. Tillotson and *H. G. Wollcott*, for Weed Iron and Mining Company.

WESTBROOK, *J.*—The principal objection made to the granting of the petition is this: Below the surface of the ground over which the railway is to be constructed is supposed to be a bed of iron ore. The railroad company, by its petition, does not ask to take, with the surface strip of land, the use of which it seeks to acquire, the title to the center of the earth, but only so much and so far beneath the surface as will leave the road bed solid and firm, and to the remainder of the land beneath such surface it seeks to acquire no title. The object of framing the petition in this form is to prevent the railroad company from acquiring title to or the right to use any part of the ore bed, which it does not need, and which is supposed to be valuable to the owners.

The owners of the land insist that the company must acquire title to the whole strip downwards and upwards, so far as the title of the owners may extend in either direction, and that less than this cannot be taken. They, therefore, resist the application for a commission, and ask that the proceedings be dismissed. The question, what interest or estate in property can or must a railroad corporation acquire by condemnation under the statute?—which the objection presents, is an important one, and, as it is not settled in this state by a direct adjudication, must be answered by the statute itself, and established principles of law.

The general railroad act (*chap. 140, Laws of 1850, sec. 14*), under which this application is made, provides that the peti-

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tion "must contain a description of the real estate, which the company seeks to acquire." The commissioners appointed (*sec. 15*) are "to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken," and when the report is made and confirmed, and the sum awarded paid (*sec. 18*), "the company shall be entitled to enter upon, take possession of, and use the said land for the purposes of its incorporation, during the continuance of its corporate existence, by virtue of this or any other act; and all persons who have been made parties to the proceedings shall be divested and barred of all right, estate, and interest in such real estate, during the corporate existence of the company as aforesaid."

It will be observed that the company is to describe "the real estate" it seeks to condemn, and that it cannot acquire such property in fee, but simply to "use * * * for the purposes of its incorporation during its corporate existence," and that the owners are barred of their "rights, estate and interest" therein only "during the corporate existence of the company." It may, therefore, very properly be asked, as a railroad company can only acquire land to "use * * * for the purposes of its incorporation," and when acquired, can only hold it during its corporate life, why should it be compelled to take that which it does not need, and which it cannot possibly use? Why, also, may it not limit the extent of its acquisition beneath the surface, as well as that upon the surface? The corporation acquiring land is not bound to take all that the owner has upon the surface, and no reason is known why it should be forced to take all that the owner has below the surface. If the objection made to the petition in this matter is maintainable, a corporation will be oftentimes compelled to acquire property which it does not need, and very frequently owners of real estate will be compelled to part with that which they actually desire to retain, and which when acquired by the company would be of no use to it. A construction of the statute involving such consequences

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should not be adopted if it can be reasonably avoided. On the contrary, the old maxim, "An argument drawn from inconvenience is forcible in law," should be observed, "unless it is very clear that violence would be done to the language of the act by adopting any other construction." (*Broom's Legal Maxims*, 184, 185, 186.) When a law, as that of 1850 certainly does, limits the right of the applicant in the condemnation of property to its actual needs in doing that which it was organized to do, and when it must specify that, and only that in its petition, it is difficult to see how its words are tortured or strained by holding, as is now held, that a railroad corporation desiring to build its road upon the surface of the earth, and having no need of that which is below, cannot be compelled to acquire and to pay for ore far below such surface, which to it is of no value whatever. Instead of doing violence to the language of the statute, upon which the present application is founded, by overruling the objection made to it, it seems clear to me that such ruling is sustained by its words, by its evident intent, and by every consideration of sound public policy. If, in the present case, it is the interest of the owners of the land to force upon the railroad company its ore bed, it should be remembered, that not only will injustice be thereby done to the corporation, but in so doing a principle will be adopted which will oftentimes force from the owner that with which he is unwilling to part, and compel corporations, in order to utilize property acquired, to embark in operations foreign to their incorporation, and for which they are not legally organized.

Allusion has already been made to the fact, that by the act under which the application has been made, the petitioner does not acquire the fee of the land, but only the right of "use * * for the purposes of its incorporation during the period of its corporate existence" (*Chap. 140, Laws of 1850, sec. 18*). This proceeding, therefore, when conducted to a termination, will not give to the railroad corporation any title to the iron ore below the surface of the ground (*Blake agt.*

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Rich, 34 *N. H.*, 282; *Lyon* agt. *Gormely*, 53 *Penn.*, 261); and as it would not, and as also the company only needs the use of the surface of the land, there does not seem to be any valid objection to the framing of the petition in such form as will limit the acquisition of the corporation to such surface use, and thus prevent the allowance to the owners of compensation for that which the former does not need, and the title to which it cannot acquire. In fact, the wording of the petition in the form employed is necessary to carry out a general principle of the law stated by judge COOLEY in his work on "constitutional limitations" (see page 557), that when property is taken from the owner under the right of eminent domain, "that the right being based on necessity" it "cannot be any broader than the necessity which supports it," and that the owner "should not be altogether excluded, but should be allowed to occupy for his private purposes to any extent not inconsistent with the public use."

It is said, however, that *Hill* agt. *The Mohawk and Hudson Railroad Company* (5 *Denio*, 206; 7 *N. Y.*, 152) decides that the fee simple of the land to the center of the earth must be acquired. This is a mistake; it decides no such proposition. The vice of the award, in that case, was that it did not give to the owners the full value of the land sought to be condemned, but lessened such value by granting to the owners the privilege of a way across the property actually taken.

The distinction between that case and the present one is, that while in the proceeding referred to the attempt was made to give the owner a way over the premises which the railroad endeavored to take, in this it is not proposed that the owner of the land shall have any rights in that which is taken, but the property sought to be acquired stops short of that which is reserved to the owner. In other words, the railroad company will not acquire by this proceeding any right to the mines below the surface, and consequently nothing is reserved to the owner in that which is actually condemned.

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Neither do *Canandaigua and Niagara Falls Railroad Company* agt. *Payne* (16 Barb., 273), and the *Troy and Boston Railroad Company* agt. *Lee* (13 Barb., 169), decide any principle adverse to the present petition. They do decide that the property "proposed to be taken" must be valued, and that such value cannot be swelled by considerations of inconvenience to the owners flowing from subsequent operations of the railroad, but they do not decide that the company must take more land than it needs, nor that the owner can be deprived of that which he may wish to retain, and which can be of no benefit to the company for the purposes of its incorporation.

For the reasons which have been stated the objection must be overruled and the commission asked for awarded.

SUPREME COURT.

JOSEPH F. LOUBAT agt. HERMON R. LEROY, as treasurer of the Union Club.

Clubs — Expulsion of members — Record of the proceedings of the club — Its effect as evidence — Action to restore an expelled member — Examination of witnesses as to the ground for expulsion — What questions are admissible — Examination before trial.

In an action by a member of the Union Club, who has been expelled, to have the resolution of expulsion adjudged null and void:

Held, that the minutes and report in writing of the investigating and governing committee, is the best evidence of what took place in the meeting of such committees, and upon that the resolution of expulsion was based; and any statement of the witness (who was a member of the governing committee), as to what the committee determined by its action would be his opinion only, and as such is inadmissible. It should not be allowed to such a witness to place his interpretation upon or give his opinion of the proceedings and actions of the committee, which is evidenced by the writings:

Held, also, that it would be improper for this witness to state only his judgment as to what conduct on the part of the plaintiff he deemed to

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be improper and prejudicial to the club. The vote is directed to be by ballot, and when the witness deposited his ballot he settled that question as far as he was concerned. He can no more be asked to state the particular ground upon which he based his judgment than a judge, a juror or arbitrator could, after judgment, be questioned as to the reason or basis of his determination.

Held, further, that the members of a committee of investigation or discipline should not be subjected to have their action or conduct in committee meetings, assembled for discussion and decision, made the subject of public discussion and comment. It would greatly embarrass them, and prove to be a restraint upon a free debate on the questions involved.

Special Term, February, 1883.

Joseph H. Choate, for plaintiff.

E. Randolph Robinson and *James C. Carter*, for defendant.

VAN VORST, *J.*—By its constitution, the government and management of the “Union Club” is confided to a committee of thirty-four of its members, to be known as the “governing committee.” Amongst the powers of this committee is that “to admit members, and to expel or to suspend them by ballot.” The committee was empowered to put an end to membership, for any conduct of a member improper and prejudicial to the club. By one of the rules of the club it is declared that the proceedings of the meetings of the committee “shall be held to be strictly private.” The plaintiff, having been expelled, and as he claims in his complaint, improperly, brings this action, in which he seeks to have it adjudged that the resolution of his expulsion is null and void. The action is against the club, in the name of the defendant as treasurer. Before the trial, the defendant, the treasurer, was examined as a witness on the behalf of the plaintiff. By an order made by one of the justices of this court, the witness was directed, among other things, to produce upon the examination the minutes of the meetings of the governing committee, and of the sub-committee thereof, at which any proceedings were had with respect to the plaintiff’s expulsion,

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with all statements in writing and reports of oral statements made to the sub-committee with respect to the plaintiff, together with the report made by the sub-committee to the governing committee. The witness produced upon the examination the minutes of the governing committee, which, as he stated, contained the entire action of the committee upon the plaintiff's case in the meetings held with respect thereto. He also produced the minutes of the proceedings of the investigating committee, or sub-committee, to whom it had been referred to investigate and report to the governing committee an exact statement of facts in relation to the difficulty existing between plaintiff and another member of the club, who were to be notified and an opportunity afforded them to appear before the sub-committee. The report of the proceedings of this committee to the governing committee was also produced by the witness, to which report is appended the evidence adduced with respect to the subject-matter referred to them. The minutes of the governing committee show that the report of the investigation committee was accepted by it, and that after debate a preamble and resolution was adopted in these words: "Whereas, upon the report of the committee, and the evidence adduced, it appeared that J. F. Loubat has been guilty of conduct improper and prejudicial to the club; therefore, resolved that he be expelled from membership of the club." It appeared by the testimony of the witness Leroy that he is a member of the governing committee, and that he voted on the resolution and in favor of the plaintiff's expulsion; he also acted upon the investigating committee. Upon his examination, under the judge's orders, the following question was put to the witness by the plaintiff's counsel:

"Q. Mr. Leroy, was any action taken by the governing committee which determined what conduct, on the part of Mr. Loubat, was deemed by them improper and prejudicial to the club?"

This question was objected to by the defendant's counsel on

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the ground "that the action of the committee must be determined from the documentary evidence of it; and secondly, on the ground that it called not for any facts, but for the opinion of the witness." I think the objection is well taken. The minutes and reports, in writing, produced is the best evidence of what took place in the meeting of the committee, and upon that the resolution of expulsion was based; and any statement of the witness, as to what the committee determined by its action, would be his opinion only, and as such was inadmissible. What is wanted, are the facts, not the conclusions or judgment of the witness. If the papers produced do not show upon what facts the action of the committee was based, and what it determined, the case of the plaintiff to that extent would be established. And it will be in time for him to offer evidence as to other and extrinsic facts and matters, when it shall be decided that the defendant may supplement its case by oral evidence, if it could ever be so held. But clearly it should not be allowed to this witness to place his interpretation upon or give his opinion of the proceedings and actions of the committee, which is evidenced by the writings. The plaintiff's counsel also asks the witness this question:

"Q. What conduct on the part of Mr. Loubat did you, as a member of the governing committee, deem to be improper and prejudicial to the club?"

This question was also objected to by the defendant's counsel. It would be obviously improper, when the nature and objects of this club are considered, as appears by its constitution and rules, a copy of which has been handed up with the papers, as well as the relation of the governing committee and its members to an inquiry so delicate and important to all concerned, to oblige this witness now to state orally his judgment as to what conduct on the part of the plaintiff, he deemed to be improper and prejudicial to the club. The vote is directed to be by ballot, and when the witness deposited his ballot he settled that question as far as he was con-

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cerned. He can no more be asked to state the particular ground upon which he based his judgment than a judge, a juror or arbitrator could, after judgment, be questioned as to the reasons or basis of his determination.

I shall not in *this connection*, lay any emphasis upon the requirement of the rule that the proceedings of this committee are to be regarded as "private," or in their nature confidential. Such privacy, I am sure, could not be interposed to shield proceedings so important in every view to character and reputation, if they were not taken in good faith, or were not fairly and equitably carried on. But in this instance the proceedings of the committee itself, with the facts before it, are already in evidence. And if the plaintiff's contention be correct — that no sufficient cause for the expulsion is shown by the record produced, in any fair light in which it can be considered — then, also, is his case made out to that extent, and he needs no further evidence. But it does not seem to me to be proper to allow a member voting on a resolution of this nature, with the other members of a committee of which he formed a part, to select from the facts submitted to the committee, such as he deemed to be prejudicial, and to testify in respect thereto. In inquiries of this character, one member of a committee may consider, of the matters brought before it, that the conduct of a person under investigation is reprehensible and prejudicial in respect of some particular fact, act or omission, while others may place their judgment upon the whole case. The true question is, as it appears to me, if the action of the committee may be revised here, as far as this point is concerned, does the report of facts upon which the committee proposed to act contain any evidence of conduct on the part of the plaintiff "improper and prejudicial to the club?"

The objection to the question last above stated is, therefore, sustained; and, for the same reason the following questions must be excluded:

Q. What conduct on the part of Mr. Loubat did you, as

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a member of the governing committee, deem to be improper and prejudicial to the club?

Q. For what cause did you vote for the expulsion of Mr. Loubat?

Q. Did you, as a member of the governing committee, deem the fact that Mr. Loubat had, in private conversation in the club house, used improper language, a cause for expulsion?

Q. Did you, as a member of the governing committee, deem the writing of Mr. Loubat's letter to Mr. Turnbull a cause for expulsion?

Q. Did the governing committee decide that that was a cause for expulsion?

Q. Did the governing committee decide that the communication by Mr. Loubat, of his letter to certain persons, was cause for expulsion?

The witness having, in answer to a question, said that he could not answer as to how Mr. King, a member of the committee, had voted on the resolution of expulsion, was asked these questions:

Q. Have you heard him say whether he was or not?

Q. Did Mr. King, before the governing committee, advocate the expulsion of Mr. Loubat?

Q. The minutes say that several members spoke on one side or other; was not Mr. King one of those who spoke, according to those minutes, upon the side for expulsion?

Such line of inquiry is open to the objection that it violates the sanctity of such proceedings, and would disturb their efficiency and is clearly opposed to the policy out of which such investigations originate, and by which they are to be conducted. Such investigations are in their nature judicial. If members of a committee of investigation or discipline are subjected to have their action and conduct in committee meetings, assembled for discussion and decision, made the subject of public discussion and comment, it would greatly embarrass them, and prove to be a restraint upon a free debate

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on the questions involved. It would be a check upon an inquiry after the truth and a hinderance to the application of appropriate remedies. What member of a club would be willing to serve on a committee of the character of the one under consideration, if his remarks, made in the privacy of a meeting for discussion and decision, or his vote even, was liable to be made public? It is not to be supposed that proceedings of this character are conducted according to the rigid rules and forms which belong to proceedings in courts of law, which are in general open to the public, nor to the quality of the evidence upon which the committee in the end makes its decision. With the result of the discussion, as expressed by the vote, so that it be carried by the requisite number, the parties must be satisfied. The proceedings must be just and fair and initiated upon reasonable grounds, and be conducted upon adequate notice and in good faith. And in any event, to extend the inquiry as to the action or influence of any member of a committee in the deliberations of the body, the evidence of bias, partiality, relationship or prejudice, must be first established by extrinsic facts. The question of notice is always an important one in cases of this kind, and in this view I think the question addressed by the plaintiff's counsel to Mr. Leroy — in these words, "Q. Did the investigating committee make any other communication to Mr. Loubat than the letter from its chairman, of which a copy is set forth in the complaint in this action?" — was proper and should have been answered. But the last question to which an objection was taken, on page 13 of the examination, is disallowed, for the reasons above stated. If a notice of the final meeting of the governing committee to the plaintiff, when the report of the sub-committee was acted upon, was necessary, either to give jurisdiction to the committee, or to render its proceedings regular, the failure to give such notice will doubtless be affirmatively proved.

I think this disposes of all the questions raised during the examination of this witness, so far as it has proceeded.

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I have endeavored to avoid any expression which might be regarded as bearing upon the merits of this controversy, and have confined myself only to such matters as were discussed on the hearing of this motion.

N. Y. SUPERIOR COURT.

NELSON J. BOTSFORD agt. CHARLES C. DODGE and ANSON POND.

DANIEL B. HALSTEAD agt. THE SAME.

Complaint — Demurrer — Complaint in action against two out of three trustees of a manufacturing corporation not demurrable on ground of defect of parties defendant — Allegation that corporation is duly organized does not allege the existence of any number of trustees — Code of Civil Procedure, sections 488, 454.

A complaint in an action against two out of three trustees of a manufacturing corporation, for a failure to file the annual report is not demurrable on the ground of a defect of parties defendant.

An allegation that the corporation is duly organized and existing, does not allege the existence of any number of trustees, although the statute requires three or more.

Special Term, June, 1883.

THIS action was brought against two trustees of a manufacturing corporation by a creditor of the company, to recover the amount of a debt due from it under section 12 of chapter 40 of the Laws of 1848, the company having failed to file its annual report.

A demurrer was interposed by the defendants on the ground that there was a defect of parties defendant, only two out of three trustees having been joined.

John E. Ward, for the demurrer: 1st. The defect appears on the face of the complaint. The allegation of the complaint that the company is a corporation organized, existing and

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doing business under an act of the legislature, which requires three or more trustees is a sufficient allegation of the existence of the other trustees. 2d. The action is joint and several and therefore must be brought against one or against all the trustees (*Strong* agt. *Wheaton*, 38 *Barb.*, 617; *Dean* agt. *Wheaton*, 16 *Hun*, 203).

James B. Dill (*Dill & Chandler, attorneys*), in opposition. An allegation of incorporation under the manufacturing act does not incorporate into the complaint an allegation of the existence of any number of trustees (*Smith* agt. *Ratburn*, 22 *Hun*, 150, 155.) The defect does not appear on the face of the complaint (*Parsons* agt. *Tufts*, 2 *Monthly Law Bul.*, 13; *Haines* agt. *Hollister*, 64 *N. Y.*, 1).

FREEDMAN, J.—*Held*, that an averment in a complaint of incorporation does not carry with it any allegation of the existence of any specific number of trustees, and although the law requires three or more trustees the court will not hold, without any specific allegation of the complaint, to that effect, that there existed any more trustees than are named in the complaint; that the grounds of demurrer were not apparent on the face of the complaint, and the demurrers were overruled.

N. Y. COMMON PLEAS.

PATRICK CHILDS, appellant, agt. HOMER BOSTWICK and others,
respondents.

Mechanics' lien — Insufficiency of verification — when no valid lien has been filed a personal judgment cannot be had.

A verification to a mechanic's lien that the statements therein contained were true to the best of the affiant's information and belief is insufficient, and as the lien in such case fails, the court cannot entertain the proceeding for the purpose of granting a personal judgment.

General Term, June, 1883.

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THIS was an action to foreclose a mechanic's lien. The complaint alleged the furnishing of materials and the filing of the lien. The answer put in issue both of these allegations. The proof before the referee showed that the verification to the lien filed was made by the agent of the plaintiff, and was to the effect that he had read the said notice and knew the contents thereof, and that the statements therein contained were true to the best of his knowledge, information and belief. Objection was taken to the sufficiency of this verification, upon the ground that it did not comply with the requirements of the act of 1875, which objection was sustained.

Thereupon the plaintiff claimed a right to a personal judgment, and it was held by the learned referee that, as plaintiff had failed to prove that he ever had a lien, he could not recover any personal judgment in this action, and dismissed the proceedings; and from the judgment thereupon entered this appeal is taken.

Henry Brewster, for plaintiff and appellant.

A. Prentice, for defendants and respondents.

VAN BRUNT, *J.*—It having already been decided by the general term of this court that the act of 1875 was not repealed by the act of 1880, and is now in force in this city, it is not necessary to discuss that question in considering the ruling of the referee as to the validity of the lien. The verification of the lien was that the statements therein contained were true to the best of the affiant's information and belief.

In the case of *Gray agt. Voorhes* (8 *Hun*, 612) this verification was held to be sufficient under the act of 1873, which provided that the bills of particulars might be verified by the oath of the claimant or his attorney to the effect that the same is true. The language, however, of the statute of 1875 differs materially in this respect from that of 1873. The provision of this act is that "the verification must be to the effect that the statement contained in the claim was true to

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the knowledge of the person making the same." Now it may be very well said that all that an affiant under the act of 1873 is called upon to state is that it is true to the best of his knowledge, information or belief, and that the qualifications are mere surplusage in the verification.

But the act of 1875 requires that the verification shall be made by a person having knowledge of the facts, and not mere information or belief, because the requirement of the statute is that the verification must be to the effect that the statements contained in the claim are true to the knowledge of the person making the same. The verification in question, therefore, did not meet the requirements of the statute, because it was made upon information and belief as well as knowledge.

The claim made upon the part of the plaintiff, that although no valid lien had been filed he was entitled to a personal judgment, cannot be upheld.

The existence of a lien is absolutely necessary to confer jurisdiction upon the court, and no case can be found in which it has been decided that although no valid lien existed at the time of the commencement of this proceeding, the court could entertain the proceeding for the purpose of granting a personal judgment. The case of *Weyer agt. Beach* (79 N. Y., 412) seems to dispose entirely of this question.

The judgment appealed from must therefore be affirmed, with costs.

SUPREME COURT.

JAMES DEVLIN agt. JOHN SHANNON, impleaded, &c. (two cases).

Foreclosure — Usury — Usury as a defense to a cause of action.

Where, in a foreclosure action in which the defendant interposed the plea of usury and plaintiff had judgment in his favor at special term, the general term directed a retrial, with a submission to a jury of the question of usury, the fact subsequently set up by amended pleadings that

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since the joining of issue the mortgagor had sold his interest in the mortgaged premises, and had also been adjudicated a bankrupt, did not change the legal *status* of the parties, and the question of usury must be submitted to a jury for trial.

Special Term, June, 1883.

THE plaintiff, as assignee of two certain bonds and mortgages executed by the defendant, brought suits to foreclose the same, to which among other defenses defendant interposed the plea of usury. The plaintiff had judgment in his favor, and upon appeal therefrom, the general term of this court decided as follows:

“PER CURIAM. — From an examination of the evidence in this case, we think substantial justice between the parties requires a retrial of the action. We deem it a proper case for the court to frame and present to a jury an interrogatory whether the transaction was usurious. The judgment should be reversed and a new trial ordered, costs to abide the event.”

The cases are submitted upon the evidence taken upon the first trial, and an order amending the complaint, containing averments that since the joining of issue in said actions, the mortgagor had sold and conveyed all his interest in the mortgaged premises; and has also been adjudicated a bankrupt. These facts are admitted by the counsel for the defendant, who insists, however, that as the original answers have been allowed to stand, the relation of the parties has not been changed, and that the plea of usury still prevails.

W. H. Arnoux, for plaintiff.

Henry Bischoff, Jr., for defendant.

LARREMORE J. — It does not appear that the conveyance of Shannon's interest was made subject to the mortgages or that the grantee assumed any personal liability. This fact is essential if he is to be estopped from contesting their validity (*Hetfield* agt. *Newton*, 3 *Sandf. Ch. R.*, 565; *Knickerbocker Life Insurance Co.* agt. *Nelson*, 78 *N. Y.*, 152; *Schemerhorn*

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agt. *Tallman*, 14 *N. Y.*, 93; *Hartley* agt. *Harrison*, 24 *N. Y.*, 170).

As the owner of the equity of redemption without notice of the usurious contract, and without personal liability thereupon, he is a privy in estate, and may attack or defend the security given by his grantor (*Dix* agt. *Van Wyck*, 2 *Hill*, 522; *Mason* agt. *Lord*, 40 *N. Y.*, 476; *Ord on Usury*, 131).

Plaintiff's waiver of his claim for a judgment of deficiency against the mortgagor cannot change the result. The transaction must be viewed as originally made, and there is nothing to show that the defendant ever intended to waive the defense of usury. He still holds the relation of the borrower within the statute of 1837, and, consequently, is not affected by the rulings in *Wheelock* agt. *Lee* (64 *N. Y.*, 247), *Bissell* agt. *Kellogg* (65 *N. Y.*, 437), *Buckingham* agt. *Corning* (64 *How. Pr.*, 503).

As there has been no direction of the court to the contrary, the action may be continued against the original party in interest (*Code of Civil Procedure*, sec. 756; *U. S. R. S.*, sec. 5047; *Cuff* agt. *Dorland*, 7 *Abb. N. C.*, 194; *Platt* agt. *McMurray*, 63 *How. Pr.*, 149).

The legal *status* of the parties is precisely the same as it was when the case was heard on appeal, and being now submitted upon the same evidence, I have only to follow the intimation of the general term, and direct that the question of usury be submitted to a jury for trial.

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SUPREME COURT.

WILLIAM H. PARSONS, plaintiff and respondent, agt. DANIEL J. SPRAGUE, impleaded, defendant and appellant.

Attachment on property—Motion to vacate may be made after judgment has been entered and execution has been issued—Code of Civil Procedure, § 682.

This action was commenced in June, 1879, against the trustees of the McKillup & Sprague Company, on the ground of statutory liability for failure to file annual report, and judgment was recovered after trial in March, 1882. On December 8, 1879, a warrant of attachment was issued against the property of the defendant Sprague and levy made upon the same. On the 21st of March, 1882, after judgment as above, and execution had been issued and levy made upon the same property, the defendant moved to vacate the attachment on the ground of irregularity. The motion was denied by Mr. justice LAWRENCE, "upon the ground that judgment has been entered and execution has been issued:"

Held, that under section 682 of the Code of Civil Procedure, the motion to vacate may be made "at any time before the actual application of the attached property or the proceeds thereof," &c.; that this motion was made in time and must be heard now on its merits.

First Department, General Term, May, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order denying a motion to vacate an attachment after judgment entered and execution issued.

Gilbert R. Hawes, for plaintiff.

W. Z. Larned, for defendant.

BRADY, J.—Daniel J. Sprague, the appellant and one of the defendants, applied at the special term for an order vacating the attachment issued herein. The application was not made, however, until after final judgment and execution had been issued thereupon. For that reason the learned justice

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who presided at the time the motion was made, denied it. He says: "The motion to vacate the attachment is denied in this case for the reason that judgment has been entered and execution has been issued."

No other question, therefore, was considered by him, and the merits of the application were not passed upon.

The views of the learned justice would seem erroneous. By section 682 of the Code of Civil Procedure, it is provided that the defendant or a person who has acquired a lien upon or interest in his property after it was attached, may at any time before the actual application of the attached property, on the proceeds thereof to the payment of a judgment recovered in the action, apply to vacate or modify the warrant or to increase the security given by the plaintiff or for one or more of these forms of relief together, or in the alternative; and section 683 provides for the manner in which the application may be made, namely, upon the papers on which the warrant was granted or upon proof by affidavit on the part of the defendant.

It appears, therefore, clearly that the legislature intended to give the defendant all opportunity of moving to vacate the attachment, notwithstanding an execution had been issued, unless there has been an actual application of the attached property, which would necessarily involve the sale. This view is confirmed by reference to section 687, which provides that the defendant may at any time after he has appeared in the action and before final judgment apply to the judge who granted the warrant or to the court for an order to discharge the attachment as to the whole or a part of the property attached. But by section 668, upon such application the defendant must give an undertaking.

There are therefore two remedies provided for the defendant for relief from the presence of an attachment, one of these being by motion, which may be made at any time before the actual application of the attached property or the proceeds thereof to the payment of the judgment, and the

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other by application before final judgment, which must rest upon an undertaking, as we have already seen.

The right of the defendant to move after final judgment and execution issued seems to be an anomaly, and would not be sustained except upon imperative necessity demanded by the absolute construction of the provisions of the Code, for the reason that upon the issuing of the execution and the levy of the attached property under it the attachment itself for all purposes ceased to exist. Its office has been performed and the property was in *custodia legis* under another process which was altogether distinct from the attachment itself and founded upon an entirely different result. But there seems to be no doubt about the intention of the legislature to extend the remedy down to the period named, "before the actual application of the attached property or the proceeds thereof to the payment of the judgment recovered in the action." What the particular object of this was cannot be well divined. It may have had some connection with the right of the defendant to appeal to have his property surrendered to him during the pendency of this appeal. If that were the object it was a good one, doubtless, but we are not called upon to furnish reasons why an act of the legislature was passed. It is our duty to declare what it accomplished by it, and nothing more. For these reasons the order below must be reversed, with ten dollars costs and disbursements of this appeal, and the motion to deduct to be heard upon its merits.

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N. Y. SUPERIOR COURT.

JOHN W. GREENE agt. THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY.

Railroads — Street obstruction by — The extent of their liability — Right of action by owner of the fee of premises to recover damages sustained by reason of the closing of St. Johns Park, the erection of a freight depot thereon, the construction and continued existence of a steam railroad through Hudson street, the operation of the railroad and the manner of its operation.

In an action brought by plaintiff as owner of the fee since 1874, of premises situated on the north-westerly corner of Hudson and Laight streets in the city of New York, to recover damages sustained by reason of the closing of St. Johns Park, the erection of a freight depot thereon, the construction and continued existence of a steam railroad, through Hudson street, the operation of a railroad and the manner of its operation :

Held, 1st. That the plaintiff has no claim by reason of the discontinuance of the park or square or the erection or the mere continuance of a freight depot thereon.

Under the circumstances the plaintiff cannot complain that the depot erected by the railroad covers the whole area formerly occupied by the park or square. He is bound to show an easement in the park or square either by express grant or by dedication. In either case the burden of proof is upon him. No express grant is shown.

Before the law will, in the absence of an express grant, protect a mere right to a prospect or air over land separated from the plaintiff's premises by an intervening street, it must affirmatively appear that the prospect and the air were within the contemplation of the original parties as objects of the dedication.

The mere facts that Trinity church in 1797 had a map made of its property, which, among other parcels, contained a tract marked Hudson square, and that in 1805 one of the plaintiff's predecessors in title purchased from Trinity church the premises in suit as a lot bearing a certain number on said map, do not establish that one of the objects for which the square was marked out was to secure to the lot sold a prospect and a passage of air over the space.

Held, 2d. That the plaintiff has no cause of action for damages by reason of the construction and continuous existence or maintenance of the railroad.

The law of the public street of a city is motion. Any use of a street, though a new one, which does not materially abridge or obstruct the

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right of passage and repassage, of ingress and egress, and to light and air of the abutting owner, gives no cause of action; but every unnecessary material abridgement or obstruction, though of a temporary character, and every continuous material abridgement or obstruction, though made in the pursuit of a lawful business, and to some extent called for by circumstances arising in the course of such pursuit, by which the right of an abutting owner to pass and repass, to have free access to and egress from his premises, and to enjoy the light and air from the street, is unreasonably affected, gives to the injured party, in case of special damage therefrom, a right of action against the offending party for the recovery of the damages actually sustained; and in order to determine any such question each case must be disposed of on its own facts and circumstances.

This principle applies to all infringements of and obstructions in the streets of a city, irrespective of their nature and of the persons by whom they are caused.

Held, 3d. That the plaintiff, upon the proofs now before the court, and such additional proofs as he has offered to give and may properly give upon the issues as now restricted, has the right to have his case submitted to the jury.

Held, 4th. That the rule of damage is the impairment of the rental value of the premises from the year 1874, when the plaintiff became the owner, to the time of the commencement of the action, and the impairment must be determined with reference to the condition in which the premises were in that year, and with reference to the uses for which the premises were then rented, or to which they could have been put in the condition they were in, but for the excessive exercise, if there was any, of defendant's business. But before any such special damage can be recovered it must appear affirmatively that it was directly and wholly caused by some act on the part of the defendant, which, within the rules laid down, was actionable if accompanied by special damage.

In this case the jury rendered a verdict in favor of the plaintiff for six cents damages.

At Circuit, March, 1883.

MOTION to dismiss the complaint.

Julien T. Davis and *J. B. Miller*, for plaintiff.

Frank Loomis and *H. H. Anderson*, for defendant.

FREEDMAN, *J.* — This case presents so many interesting questions, and the authorities cited and relied upon by the

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learned counsel for the parties are so numerous, that, owing to the short period I had for their examination, the result of my examination must be announced briefly and without much elaboration.

The action is brought by the plaintiff as owner of the fee, since 1874, of premises situated on the north-westerly corner of Hudson and Laight streets, in the city of New York, to recover damages sustained by reason of the closing of St. John's Park, the erection of a freight depot thereon, the construction and continued existence of a steam railroad through Hudson street, the operation of the railroad and the manner of its operation.

In 1879 the corporation known by the title of "The Rector and Inhabitants of the city of New York in communion with the Protestant Episcopal Church in the State of New York" (which for convenience sake I shall hereafter style the corporation of Trinity church), as owner in fee simple of a large tract of land in that vicinity, caused a map to be made of its property on which St. John's Park appears under the name of Hudson Square. In 1803 the said square seems to have been set apart by the corporation as a private ornamental park or square for the benefit of the persons who had leased or should lease from Trinity church adjacent lots of land directly fronting towards the said park or square on each side thereof. The lessees of such adjacent lots subsequently acquired title to their respective lots by purchase from Trinity church. The owners of all other lots in the vicinity, though they also derived their title from Trinity church, were to have no right or claim to the continuance of the park or square as such.

The park or square extended to the east side of Hudson street, from Beach street on the south to Laight street on the north. The premises in suit are situated on the north-westerly corner of Hudson and Laight streets. They, therefore, never fronted towards the said park or square, and neither under the arrangement pursuant to which in 1803 the park or square seems to have been set apart, nor under the declara-

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tion of trust executed by Trinity church in 1827, had they the right or easement attached to them that the park or square should be continued and preserved as such.

By deed of March 2, 1867, Trinity church with the assent of the requisite number of adjacent owners whose lots fronted towards the park or square, and in consideration of the sum of \$1,000,000, conveyed as it lawfully could do, the said park or square to the Hudson River Railroad Company. The description of that deed by legal construction conveyed the fee to the center of the streets by which the park or square was bounded, but as matter of fact the fee of said streets had already been ceded by Trinity church to the corporation of the city of New York in trust for the use of the public.

The freight depot erected by the Hudson River Railroad Company covers the whole area formerly occupied by the park or square. But of this the plaintiff cannot, under the circumstances stated, complain. He is bound to show an easement in the park or square either by express grant or by dedication. In either case the burthen of proof is upon him. He showed no express grant. Now, before the law will, in the absence of an express grant, protect a mere right to a prospect or air overland separated from the plaintiff's premises by an intervening street, which is all the plaintiff's claim as to the park or square amounts to, it must appear affirmatively that the prospect and the air were within the contemplation of the original parties as objects of the dedication. There is no proof that the park or square was ever dedicated to the use of the public in general. Upon plaintiff's own showing it was not. Nor do the mere facts that Trinity church in 1797 had a map made of its property, which, among other parcels, contained a tract marked Hudson square, and that in 1805 one of plaintiff's predecessors in title purchased from Trinity church the premises in suit as a lot bearing a certain number on said map establish that one of the objects for which the square was marked out was to secure to the lot sold a prospect and a passage of air over the square. The cases cited by the

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plaintiff in support of such a claim are all cases in which the dedication of the park or square was either made for the use of the public in general or held out as an inducement to buyers. In the case at bar there is not only no proof of such an element, but the numbering of the lots on the map itself and the action of Trinity church in 1803 speak against it.

The plaintiff has, therefore, no claim by reason of the discontinuance of the park or square, or the erection or the mere maintenance of a freight depot thereon. The next question is whether the plaintiff has a cause of action by reason of the building of the railroad.

In 1846 the legislature of the state of New York duly passed an act for the construction of a railroad from New York to Albany, under which, and the acts amendatory thereof, the Hudson River Railroad Company was organized and the road built and operated until 1869, when a consolidation took place between the Hudson River Railroad Company and the New York Central Railroad Company, pursuant to which the company, which is the defendant at bar, was formed, and by which the operation of the road passed into the hands of the defendant. So far as the consent of the city was necessary for the building and the operation of the road within the limits of the city it was duly given. This has heretofore been expressly decided.

But neither the action of the legislature nor that of the city, nor the joint action of both, could divest any of the predecessors in title of the plaintiff of any vested right in the premises in suit or appurtenant thereto. This brings me to the consideration of the question as to what rights, as against the railroad company, such predecessor in title had in and to Hudson and Laight streets.

In 1849, when the railroad company attempted to lay its rails south of Canal street, a number of owners of real estate fronting upon Hudson street and other streets applied for an injunction restraining the company from laying any rails from the northerly line of Canal street and West street,

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through Canal and Hudson streets, to Chambers street. In the course of that litigation, reported under the title of *Drake agt. The Hudson River Railroad Company* (7 Barb., 508), it appeared that the parts of Hudson and Laight streets, with which we are at present concerned, were originally laid out by Trinity church, as owner of the fee of the land and the surrounding lands as streets, and dedicated to the public in general as such, and thereafter, in 1813, conveyed to the city in trust that the same should be kept open as streets for the use of the citizens of said city forever. The general term of the supreme court, after full examination of all the facts, deemed it unnecessary to determine whether the plaintiffs owned the fee of the soil of the streets, inasmuch as the land comprised within the limits of the streets had been dedicated by Trinity church to the public for the purposes of streets before any conveyances of lots were executed to anyone. It was expressly decided, however, that the city had full authority to regulate the public uses to which said streets could be put; that the construction of the railroad through Hudson street, of itself, infringed no private rights, provided the passage over the streets was substantially left free and unobstructed; that in such case no private property was taken for public use without compensation, within the meaning of the constitutional prohibition; and that for the reasons stated, no injunction could be issued or maintained. At the same time the rights of abutting owners and of the public were clearly defined, and their right of action for damages in certain contingencies affirmed. But of these matters I shall speak hereafter.

The points stated as having been expressly decided have remained good law ever since. The cases cited by the plaintiff contain no decision to the contrary, and in every case which in the course of the reasoning a *dictum* appears which seems to be in conflict, it will be found that additional facts were involved — such as, for instance, a material change in the grade of the street, an excavation or permanent obstruction.

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Nor were the said points so decided shaken by the decisions in the elevated railroad cases, for these were placed upon the ground that the permanent structure of an elevated road, of the size and height it was made to appear, occupies so much of the street, and interferes so much with the ordinary uses of the street, and is so inconsistent with such uses as to work a destruction *pro tanto* of the easement which every abutting owner has as an appurtenance to his land, to light and air, and ingress and egress and that such destruction amounts to a taking of property.

The decision in *Drake agt. The Hudson River Railroad Company* is fatal, therefore, to the claim advanced by the plaintiff for damages by reason of the construction and continuous existence or maintenance of the road.

Aside from the reasons already stated, there are others equally fatal to plaintiff's claim for damages in so far as it is founded upon the erection of the depot in place of the park or square and the construction of the road. These matters in so far as they may be considered as obstructions, if they are such, constitute permanent obstructions, and if there was an easement in or to the park or square, or if the predecessors in title of the plaintiff owned the fee of the soil in Hudson street to the center of the street, the creation of the permanent obstructions immediately gave a claim for damages which, under the decision of *Van Zandt agt. The Mayor, &c.* (8 *Bosw.*, 375), became vested as a chose in action in the then owner of the fee and subsequently passed to the personal representatives of such owner. The present plaintiff, who acquired title by devise in 1874, has no title to such claim, if it ever existed. Moreover it is barred by the statute of limitations.

The plaintiff's claim has now been reduced to a claim arising out of the continued operation of the road, the manner in which since 1874 it was operated, and the manner in which defendant's business was conducted during the same period in the immediate vicinity of plaintiff's premises.

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As the owner of property bounded by Hudson and Laight streets, the plaintiff has rights in said streets and an interest in the maintenance of them in their integrity; but such right and interest consist merely in the use, benefit and enjoyment of them as public streets or highways for the legitimate uses and purposes of streets, and he has no private or exclusive right to, or property in, the use or enjoyment of them. All other citizens have an equal right with him to the use of them, even if he should own the fee of the soil to the center of the street, because the fee would be subject to the right of the public to travel over the surface of the street and to have the street continued forever as a public street. And the railroad company, as part of that public, it has been held in *Drake agt. The Hudson River Railroad Company*, has the same right, in common with others, to use the surface of the same, under the rules and regulations prescribed by the proper authority, for the purpose to which the lands forming the streets were dedicated to the public. Since that decision, it is true, the power of the mayor and common council of the city of New York to grant such privilege to a railroad company has been very much restricted by legislative enactments, and the power of the legislature itself has been restricted by constitutional amendments. But these changes of power do not affect the case at bar, because they have no retroactive effect.

A railroad having lawful warrant for its existence and operation cannot be a nuisance *per se*. Nor is the use of a street in a city for the purposes of a railroad, in a manner which does not materially abridge or obstruct the right of passage and repassage for other purposes, such an exclusive appropriation of the street as to amount to a nuisance or a purpresture. In these respects no distinction exists between steam and horse railroads. True, a steam railroad is more apt to become a nuisance than a horse railroad. But whenever it does so in the use of the mere surface of a street, the nuisance arises from the manner in which and the extent to which it is operated to the exclusion of the proper and ordi-

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nary uses of the street. The fact is, that either may become a nuisance by an abuse of the public streets. It requires but little elaboration to demonstrate these propositions.

As was said in *Drake agt. The Hudson River Railroad Company*, a leading use and purpose of a public street is for travelers and others to pass and repass over the same, with horses, carriages and other vehicles, and on foot. All parties must concur in that definition as applicable to the right of way over the public streets of the city. Now does not the railroad, with its cars propelled by the application of steam or by animal power, come equally within the definition, as the cart, carriage or omnibus drawn by animals? It is a new mode of using the street, but it is still a use of it for passing and repassing through it, whether freight or passengers or both are transported. The law-making power, in the absence of constitutional restrictions, has authority to regulate the use of the highways by every species of carriage whether already known or susceptible of introduction on the highways, and the rule, if well settled, that the diminution to a moderate extent of the accommodation of the public, for the better accommodation of a larger portion of the public, does not involve the invasion of public or private right. Those who ride in their own carriages or whose business may be affected by the laying of rails in the street, are a minority. The railroad is a part of the history of the times, and when properly conducted a great public benefit. The greater portion of the community are accommodated and benefited in various ways by it, and the fact that a small number of people are inconvenienced, does not constitute the road a nuisance.

For these reasons it has been held that a railroad company having lawful warrant for its existence and operation may, as incidental to the right of transit, run trains through the streets of a city, establish a turnout so as to communicate with a station on the street, use the street for shifting cars and making up trains, and even stop its cars on the street to unload them.

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But all the cases recognize the principle that any or all of these things must be done at a time and in a manner which is reasonable under all the circumstances. As long as that is the case the railroad company is not liable in damages to anyone; and even the fact that at such intervals the owner in fee of a public street is prevented from loading and unloading wagons in front of his store would not constitute special damage. This has been held in *Hobart agt. Milwaukee City Railroad* (27 Wis., 194; 9 Am. R., 461).

So it is a well settled principle of law that the conduct of any business intrinsically lawful may give rise to a cause of action if under all the circumstances it occasions an unreasonable encroachment on the public highway. Thus in *Rex agt. Jones* (3 Camp., 230), lord ELLENBOROUGH said: "A cart or wagon may be unloaded at a gateway, but this must be done with promptness. The defendant is not to eke out the inconvenience of his premises by taking the public highway into his timber yard; and if the street be too narrow he must remove to a more commodious situation for carrying on his business."

In *King agt. Russell* (9 East., 427) it was held that if the nature of the defendant's business were such as to require the loading and unloading of so many more wagons than could be done conveniently within his own private premises, he must either enlarge his own premises or move his business to a more convenient spot. And in *Moore agt. Jackson* (2 Abb. N. C., 212) it was held that a systematic and continued encroachment on a highway, though for the purpose of carrying on a lawful business, is unjustifiable.

The same principle applies to the operation of railroads through the streets of a city of which the company does not own the fee. For a railroad, though having lawful warrant from the public authorities for its existence and operation, may be so operated as to destroy the right of an abutting owner to the use and enjoyment of the street. Trains on a steam railroad may be run in such numbers and in such rapid

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succession, by day and by night, and in such close proximity to an abutting owner's premises as to render the street at all times impassable for him except perhaps on foot. A side track of a horse-car railroad may be so close to an abutting owner's premises as to cut off all access to such premises while encumbered for days and weeks with a row of cars not in ordinary use. The moment, therefore, that the operation of a railroad or the manner of its use become under all the circumstances of a case unreasonable as to a particular individual and special damage ensues in consequence thereof, the operation of the road or the manner of its use, though the road has lawful public authority for its existence and operation by which it is protected from being presented as a public nuisance becomes, as to the individual so injured, a private nuisance, and he may maintain an action for the special damage. And in the case of a continuing trespass causing continuous injury the authorities are to the effect that successive actions may be brought year after year, so long as grass grows and water runs.

I have, so far, discussed only the right of an abutting owner to the use of the street and to access to and egress from his premises bounded by the street. Under the decision of the court of appeals, in *Story* agt. *N. Y. Elevated Railroad Co.*, such owner's right to light and air from the street stands upon the same footing. A load of manure or raw hides may be carted past his premises and the smell enter his house. For that he is without remedy in the law. For the same reason he has no cause of action by reason of the escape of smoke, gas or cinders from the passing locomotives of a road in lawful existence and operation, provided the occurrences do not exceed a reasonable extent. So, any passing object may temporarily darken certain rooms. Against this the owner has no remedy. It is his privilege, in the pursuit of a lawful business and for a necessary purpose, to do the same to his neighbor. But a row of cars not in immediate use may be so placed against certain of his windows, and kept in such position for

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such a length of time, as to materially interfere with the enjoyment of certain rooms, and for this the law would afford him redress.

The principle deducible from what has been said, and from many cases that might be cited, is that the law of the public street of a city is motion; that any use of a street, though a new one, which does not materially abridge or obstruct the right of passage and repassage, of ingress and egress, and to light and air, of the abutting owner, gives no cause of action; but that every unnecessary material abridgment or obstruction, though of a temporary character, and every continuous material abridgment or obstruction, though made in the pursuit of a lawful business and to some extent called for by circumstances arising in the course of such pursuit, by which the right of an abutting owner to pass and repass, to have free access to and egress from his premises, and to enjoy the light and air from the street, is unreasonably affected, gives to the injured party, in case of special damage therefrom, a right of action against the offending party for the recovery of the damages actually sustained; and finally that, in order to determine any such question, each case must be disposed of on its own facts and circumstances.

The principle thus evolved applies to all infringements of and obstructions in the streets of a city irrespective of their nature and of the persons by whom they are caused.

The law being as stated, the plaintiff, upon the proofs now before the court and such additional proofs as he has offered to give and may properly give upon the issues as now restricted, has the right to have his case submitted to the jury.

The rule of damage is the impairment of the rental value of the premises from the year 1874 to the time of the commencement of the action, and the impairment must be determined with reference to the condition in which the premises were in that year, and with reference to the uses for which the premises were then rented or to which they could have been put in the condition they were in.

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After the close of the evidence on both sides, the case was summed up by the counsel for the respective parties, whereupon FREEDMAN, J., charged the jury as follows, viz. :

Gentlemen of the jury. — The claim of the plaintiff, as owner of the premises situated on the north-west corner of Hudson and Laight streets, to recover damages for the closing of St. John's Park, the erection of a freight depot thereon, and for the construction and maintenance of a steam railroad on and through Hudson street, having been disposed of as matter of law, the only cause of action left with which you have any concern arises from the operation of defendant's railroad and the manner of its use. In determining that issue you must start with the proposition that the road was lawfully built, the freight depot extending from Laight street south to Beach street on the easterly side of Hudson street lawfully erected, and that the defendant had lawful warrant from the public authorities to operate the road, and in the course of the operation to use dummy engines to draw cars between the several passenger and freight stations of the road in the city of New York. As incidental to these rights the road, upon the evidence in the case, must be deemed to have possessed the right to maintain and operate the necessary switches and turnouts and curves and side tracts leading into the freight depot, and to use part of Hudson street for shifting cars and breaking up and making up trains and even loading or unloading some cars in case of special necessity. To this extent the road is protected by the law from being considered as a public nuisance.

But as against the plaintiff as an abutting owner this of itself is not a complete answer. He also had rights in Hudson street. Whether he owns or owned the fee of the soil to the center of that street subject to the easement of the public to travel over it, or only an easement in and to the use of the street as a public street, it is not necessary to determine with precision. In either case he had the right to travel over the street and to have free access to and egress

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from his premises, and to enjoy the light and air from the public street, subject only to the right of the public to use and enjoy the street as a public highway for the legitimate uses and purposes of a public highway. This qualified right of the plaintiff the railroad company was bound to respect, and no action of the legislature or of the authorities of the city, nor the joint action of both could absolve it from the duty. For the right of the railroad company to use, without compensation to abutting owners, a public street of the city rests upon the theory that the railroad company is part of the public and that the use of a public street for the purposes of a railroad, though a new use, is not one which of itself is inconsistent with the proper and legitimate uses of the street by the public at large.

As between the plaintiff and railroad company, therefore, their rights were to a certain extent mutual. Both parties constituted part of the public. The consequence is, that as against the plaintiff the operation and use of the road could be carried only to an extent which, in view of what I have said, was reasonable under all the circumstances. As long as this limit was not exceeded, the plaintiff is without redress, and the defendant is entitled to your verdict. If the limit was exceeded the operation and use of the road constituted, as against the plaintiff, a private nuisance to that extent, and if the plaintiff sustained special damage thereby he is entitled to recover such damage.

To be more specific, the rule which you are to apply to the facts and circumstances of this case, is as follows, viz: For any use by the railroad company of the streets in the vicinity of plaintiff's premises which did not materially abridge or obstruct the right of passage and repassage, of ingress and egress, and to light and air of the plaintiff and his tenants, and especially for everything that was necessarily incidental to the right of the proper passage of the trains, whether it was noise, or smoke, or gas, or vibration of the walls, the plaintiff has no cause of action. 🐾

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But for every material abridgment or obstruction beyond that, though of a temporary character which was not necessary to the proper lawful prosecution of defendant's business; and for every *continuous* material abridgment or obstruction of Hudson street, which was inconsistent with the legitimate uses of the street as a thoroughfare for the public in general, though made in the pursuit of the defendant's lawful business, and to some extent called for by the exigencies of that business, by which the right of the plaintiff and his tenants to pass and repass, to have free access to and egress from the premises, and to enjoy the light and air from the street, was unreasonably affected, the plaintiff may recover, provided he has shown special damage therefrom.

The rule of damage is the impairment of the rental value of the premises from the year 1874, when the plaintiff became the owner, to the commencement of the action in 1880, and the impairment must be determined with reference to the condition in which the premises were in that year, and with reference to the uses for which the premises were then rented or to which they could have been put in the condition they were in but for the excessive exercise, if there was any, of defendant's business. But before any such special damage can be recovered, it must appear affirmatively that it was directly and wholly caused by some act on the part of the defendant which, within the rules already laid down, was actionable, if accompanied by special damage.

I have given you now in general outline the essentials which the plaintiff must establish before he can recover. The burden or proof is upon him throughout and he must establish a case within the rules laid down by me by a preponderance of evidence. If upon any point material to his cause of action he presents merely an evenly balanced case, the defendant is entitled to your verdict.

And especially must I caution you to see to it that every damage you may wish to award compensation for is proven to have been the direct and natural result of some act on the

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part of the defendant which, within the rules laid down by me, was actionable if accompanied by special damage. The testimony discloses many causes which may have co-operated. When Trinity church with the consent of the owners of the lots fronting on St. John's Park, on the south sides thereof, in 1867 conveyed the said park to the defendant, and it became known that a freight depot was to be erected thereon, it was but natural that all who had valued that vicinity as a choice locality on account of the existence of the park for private residences should remove, and that the character of the entire neighborhood should change. But of this the plaintiff cannot complain. So you have the panic of 1873 and the general depreciation of real estate throughout the city in consequence thereof. But of these matters the plaintiff cannot complain. There are many other circumstances which upon this branch of the case it will be your duty to look at, but you will remember them for yourselves. I can only repeat that any verdict for the plaintiff must be based upon affirmative proof of special damage which directly and naturally resulted from some act of the defendant that within the rules laid down by me is actionable. If plaintiff's proof does not come up to this requirement it will be your duty to render a verdict for the defendant.

So if you should find that the actual rental of the premises from 1874 to 1880 amounted to what in your judgment upon the evidence was, notwithstanding the matters complained of, a fair one during that period, the plaintiff cannot recover. In this connection I must make, because I have been specially requested so to do, a reference to the testimony of Mr. Castree, who was placed upon the stand as an expert by the plaintiff, and whose opinion was that if no railroad had been there at all, \$2,000 would have been a fair rental per year during the period in question. If this were the only testimony available to the plaintiff upon this branch of the case it would be fatal to plaintiff's claims, for the evidence shows conclusively that in spite of all the matters complained of the

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plaintiff actually collected a good deal more. But it is not. While, therefore, the suggestion in the argument of plaintiff's counsel that Mr. Castree misunderstood the question propounded to him is entitled to no weight, because the witness was not asked to explain his answer or recalled for that purpose, the plaintiff on the other hand is not absolutely concluded by Mr. Castree's statement. It is simply a circumstance in the case to be weighed and considered with the circumstances covered by the testimony of the other experts called on both sides, and with the facts bearing upon the same point as disclosed by the whole case.

In any event it is your duty to carefully sift, weigh and consider the whole of the evidence and all the bearings thereof, for the purpose of arriving at a result which will do justice between the parties. The fact that the defendant is a rich and powerful corporation, must have no influence on your minds. You are to decide the issue submitted to you as you would if the defendant were a natural person, and to that end you must endeavor to divest yourselves of all prejudice if any you should have.

I have already instructed you that any verdict for the plaintiff must rest on affirmative proof of special damage directly caused by some act of the defendant, which, within the rules laid down by me is actionable, and that the burden to make such a case is upon the plaintiff. If his case does not come up to the requirements stated by me, you will find for the defendant. If his case does come up to said requirements, except that the evidence is of such a character that you cannot compute from it the damage sustained by the plaintiff, you will give to the plaintiff a verdict of six cents only. If his case comes fully up to said requirements, and you can compute the damage with certainty, you will give him a verdict which will fairly compensate him for the loss of rental ascertained by you, and state whether or not it is to carry interest.

Beyond making compensation you cannot go. In no aspect of the case can you give vindictive or exemplary damages,

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nor can you give, as I have already instructed you, mere speculative damages. You may now retire to deliberate upon your verdict.

The jury withdrew, and after deliberation returned and rendered a verdict in favor of the plaintiff for six cents damages.

SUPREME COURT.

In the Matter of the Application of E., formerly an attorney.

Attorney — Effect of conviction of felony on his right to act as such — Pardon by governor will not entitle him to restoration.

A conviction of an attorney of felony forfeits his right to act as such. If stricken from the roll, a pardon by the governor will not entitle him to restoration. The court will, however, examine the proofs of alleged innocence in determining whether or not he ought to be restored. In the present case the court held the presumption arising from a conviction was not overcome, and refused restoration.

Third Department, General Term, May, 1879.

Before LEARNED, P. J., BOARDMAN and TALCOTT, JJ.

LEARNED, J. — In September, 1878, this court made an order reciting that it had been informed that E. had been twice convicted of the crime of perjury and ordering the district attorney of Saratoga county to inquire into the matter and to serve proper affidavits on said E., setting forth the facts and any other material matters, and requiring said E. to show cause, at the next term, why he should not be disbarred.

At the next term in November, 1878, on notice to said E., the judgment-roll showing his second conviction, with the evidence and an affidavit of Mr. Moak, were presented to the court, and after hearing counsel on both sides, an order was made disbarring E. A writ of error had been brought by E. from the judgment against him on his conviction for perjury, and that writ was argued at that November term.

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While the court was holding the matter under advisement, after the argument of that writ of error, the governor pardoned E. Subsequently the court affirmed the judgment and conviction, finding no error therein. E. now moves to have the order vacated which disbarred him, and he bases his motion on two grounds: 1. That he has been pardoned. 2. That he is innocent.

In the Matter of Niles (48 How., 246), it was held that by convicting and sentence for a crime punishable in the state prison, the office of attorney and counselor was forfeited, that such forfeiture was like that of the forfeiture of any other public office and was not a temporary suspension. If this view is sound, and we are inclined to think that it is, then the conviction and sentence has worked a forfeiture to E. of the office of attorney and counselor, and the pardon does not reinstate him. In that view he stands very much as if he had held some such office as, for instance, that of county judge, his pardon would not have reinstated him in office. But that we may do him full justice, we will inquire next as to his innocence and fitness to be restored.

He is charged with misconduct in abstracting an affidavit in an action brought by himself as plaintiff and as attorney, against his brothers, was referred to a referee to take proof. He testified in his own behalf and produced an affidavit of his brother Alfred J. This affidavit was referred to in his testimony and was stated by him to be genuine, and was marked and attached to the referee's minutes as a part thereof. It was an important part of the evidence, and showed Alfred J. to admit the truth of the complaint.

On the trial of the indictment, Alfred J. denied having made this affidavit, and another witness explained the trick by which (as he said) it had been obtained. If that testimony was true it would be desirable that this affidavit should not be accessible. The evidence that E. removed it before filing the papers, is not contradicted. His excuse for this misconduct is that it was not his practice, nor that of older and experi-

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enced lawyers, to file the evidence with a judgment-roll. The excuse is utterly frivolous, for he did file the evidence, his own testimony, and that of Isaac H. Johnson. The only thing which he took off was this affidavit, and the reason why that was removed are easily conjectured. It was a hazardous paper to leave in a public office. The absence of the paper was discovered and he was obliged to restore it.

But of more consequence is the charge of perjury, and to understand that fully some details must be given. The action above mentioned was brought to establish a will of E.'s father as a will lost after the decease of the testator. The allegation of the plaintiff E. was that it had been lost or destroyed by the negligence of Alfred J., his brother.

The alleged perjuries consisted in matters sworn to by him before the referee and principally in this, that he testified that Alfred J. told him that among their father's papers, of which Alfred J. took possession, was this will; that in moving some private papers he, Alfred J., had lost the will; that Alfred J. made the affidavit above referred to, which contains a statement that this will was among the papers.

It is undisputed that E. did so testify. The question is whether his testimony was untrue. On the trial it was shown to be untrue by the positive testimony of Alfred J. This was corroborated by the testimony of Andrew J. Freeman, who explained the manner in which E. obtained the affidavit in question by reading another affidavit to Alfred and substituting one for the other.

Alfred's testimony is further corroborated by the testimony of Jennie McCuen, who saw the testator read over and burn a paper which he said at the time was his will, drawn up by William Johnson. It is further corroborated by E.'s own letter to his father, the testator, a short time after this destruction, in which the writer refers to a letter from his father stating that he has burned his will. It is corroborated by the conduct of E., in hiding behind a coal bin under the stairs when

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the officer was endeavoring to arrest him. The jury then were well justified in finding E. guilty.

We have now to examine what evidence he offers on this motion to show himself innocent.

First he presents his own affidavit in which he states that governor Robinson, on evidence presented to him, found him innocent. But as he does not state what that evidence was, we cannot tell whether the pardon was obtained from the sympathetic feelings of his excellency, or from his sound judgment. E. does not, however, in his own affidavit aver the truth of the testimony given on the trial or assert his own innocence.

Next we have the affidavit taken in Massachusetts of one Woodsell, stating that Alfred J. said to him that he had told E. that he had lost the will, and that at the request of E. he had made an affidavit to that effect.

Next we have the affidavit of Alfred J., which seems to be drawn with the object of saying as much as possible for E. without actually admitting his own perjury. He says that he knows E. is innocent; that his own testimony was given under a mistake; that from information which has come to him since the trial, he is satisfied that his evidence was given under a mistake; that E. was correct in all matters as alleged by him to have been stated or sworn to by deponent, &c.; that on mature consideration he knows E. is innocent. Now all this is mere trifling and quibbling. Alfred J. swore on the trial to plain and positive statements. He could not be mistaken about them, and no mature consideration was needed to enlighten his mind. What information could come to him since the trial, which could show a mistake in his testimony? Why does he not state what this information is? This is all probably evasive of the direct point in issue. He dares not say in plain language that his own testimony on the trial was false. But he pretends to mistakes and mature consideration. He knows now, and he must have known then, whether he found the will and whether he made the affidavit. If he is a repentent sinner, whose false testi-

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mony convicted an innocent brother, he would say so. As it is his affidavit is utterly valueless to show E. to be innocent.

But Alfred J., while he makes no affidavit showing the falsity of his testimony, adds an unsworn letter to the court, in which he says he made the affidavit and lost the will and his brother is innocent.

It is hardly necessary to say that an unsworn paper is worthless to contradict the testimony of a witness given under oath. We have also a copy of a letter of the same kind written by Alfred J. to governor Robinson, which was forwarded to him. If this letter constituted the evidence on which the pardon was granted, it was utterly insufficient to warrant such an act. It is a letter purporting to be written in confidence and containing a special request that it should not be seen by the district attorney of Saratoga county, or his associate counsel, naming them.

The last affidavit is that of Andrew Freeman, who was a witness on the trial. Freeman states that his testimony was not all true; that Alfred J. read and understood the same affidavit which he signed; that the affiant had no conversation with E., in which E. said that he substituted another affidavit for the one read to Alfred.

Thus a careful examination of the papers show that E. does not swear to any facts showing his innocence; that Alfred J. does not state positively that his own testimony was false, and that the only person who now contradicts plainly his former testimony is Freeman, who adds to this contradiction a very serious charge against public officers.

There still remains the evidence, undisputed, of Jennie McCuen, showing at least the probable burning up of the will by the testator himself; of E.'s own letter to his father showing that he knew at the time of the burning of the will of E.'s removal of the affidavit from the minutes and report of the referee, a circumstance only to be accounted for by his consciousness that it had been obtained by a fraud, and finally his concealment of himself to avoid arrest for his crime.

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Why should Alfred J. and Freeman be believed when they make affidavits out of court, rather than when they testify in open court and under the test of a cross-examination? If they testified falsely in court under the persuasion of persons whose names they do not divulge, is it not probable that they may testify falsely out of court under other persuasions? We consider the papers presented to be utterly insufficient to show the innocence of E.

If nothing more than these papers was presented to the governor when he granted the pardon, we must remember that it is his privilege to grant pardons of his own will and from his kind feeling towards distressed relatives even without any proof of the innocence of the prisoner. But the question presented to us is different. It is assuming for the present our right to restore E. Has he shown that he was innocent of the crime of which he was convicted? We have examined his papers carefully, as we had previously examined the evidence given on his trial, and we see no reason to doubt the correctness of the verdict which convicted him.

The motion must be denied.

An order will also be entered directing the clerk to send copies of the affidavits of Alfred J., and of Andrew Freeman, to the district attorney of Montgomery county, where they purport to have been taken and also to the district attorney of Saratoga county, and directing the district attorneys of those counties to examine these affidavits and the testimony given on the trial by the affiants, and to ascertain whether these affiants have not been guilty of perjury in the one instance or the other; and if they have been thus guilty then to take such proceedings for their indictment and conviction as the nature of the case requires.

The order to be entered and all the papers used on this motion to be filed in Saratoga county.

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NIAGARA OYER AND TERMINER.

THE PEOPLE agt. GEORGE MOORE.

Practice in criminal cases—Wife not a competent witness against her husband—When indictment will be quashed.

No evidence should be presented to a grand jury which would not be legal and competent at the trial before the traverse jury.

An indictment should be quashed when it appears by affidavit that it was found by the grand jury without adequate evidence to sustain it.

A wife is not a competent witness against her husband, and cannot be called against him by the people without his consent.

Where it appears by affidavit that the wife of a defendant was introduced as a witness before the grand jury without the consent and against the will of the husband (the defendant), and her testimony before the grand inquest being vitally material the indictment should be set aside.

Niagara Oyer and Terminer, October, 1882.

Benjamin J. Hunting, district-attorney, for people.

W. Henry Davis, for defendant.

THE following is a copy of the indictment, or two counts of the same, as found by the grand jury :

STATE OF NEW YORK, { ss. :
 NIAGARA COUNTY.

The jurors of the people of the state of New York, in and for the body of the county of Niagara aforesaid, upon their oath present that George Moore, late of the city of Lockport, in the county of Niagara aforesaid, on the sixteenth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and on divers other days and times between that day and the eighth day of December, in the year last aforesaid, with force and arms, at the city of Lockport, in the county of Niagara aforesaid, in and upon one Emma Roberts, in the peace of God and the said people, then and there being feloniously, willfully and of his malice afore-

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thought, did make divers assaults, and that the said George Moore with divers certain instruments and weapons to the jurors aforesaid unknown, which he, the said George Moore, in his hands then and there had and held in and upon the head, neck, body, arms, hands and legs of the said Emma Roberts, then and there feloniously, willfully and of his malice aforethought, did strike and beat, giving unto the said Emma Roberts, then and there with the instruments and weapons aforesaid to the jurors aforesaid unknown, by the striking and beating aforesaid in manner aforesaid, in and upon the head, neck, body, arms, hands and legs of the said Emma Roberts, divers mortal strokes, wounds, bruises and contusions, of which mortal strokes, wounds, bruises and contusions aforesaid, the said Emma Roberts on the day and year last aforesaid, at the city of Lockport, in the county of Niagara aforesaid, did die, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said George Moore, her, the said Emma Roberts, in the manner and form and by the means aforesaid, at the city of Lockport, in the county of Niagara aforesaid, on the day and year last aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

And the jurors aforesaid upon their oaths aforesaid, do further present that the said George Moore on the 16th day of November, in the year of our Lord 1878, and on divers other days and times between that day and the eighth day of December, in the year last aforesaid, with force and arms, at the city of Lockport, in the county of Niagara aforesaid, in and upon the said Emma Roberts, in the peace of God and of the said people then and there being, feloniously, willfully and of his malice aforethought, did make divers other assaults, and that the said George Moore with certain leather straps which he the said George Moore, in his right hand then and there had and held in and upon the head, neck, body, arms, hands and legs of the said Emma Roberts, then and there

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feloniously, willfully and of his malice aforethought, did strike and beat, giving unto the said Emma Roberts, then and there with the leathern strap aforesaid, the striking and beating last aforesaid in manner last aforesaid, in and upon the head, neck, body, arms, hands and legs of the said Emma Roberts, divers mortal strokes, wounds, bruises and contusions, of which mortal strokes, wounds, bruises and contusions last aforesaid, the said Emma Roberts on the day and year last aforesaid, at the city of Lockport, in the county of Niagara aforesaid, did die.

And the jurors aforesaid upon their oaths aforesaid, do say that the said George Moore, her the said Emma Roberts, in the manner and form and by the means last aforesaid, at the city of Lockport, in the county of Niagara aforesaid, on the day and year last aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

BENJAMIN J. HUNTING,
District Attorney of Niagara county.

The following are copies of the affidavits upon which defendant's counsel moved the court to permit the defendant to withdraw his plea of "not guilty," to the end that his counsel might make a motion to set aside the indictment:

STATE OF NEW YORK, }
MONROE COUNTY, CITY OF ROCHESTER. } ss. :

W. Henry Davis, being duly sworn, says he is an attorney and counselor-at-law, residing and doing business in the city of Rochester, New York, and that he is the defendant's counsel herein. That deponent has been recently informed by Carrie Moore, the wife of defendant that she testified and gave evidence before the grand jury, which found this bill of indictment against defendant and without his defendant's knowledge or consent. Deponent further says he has examined the

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minutes of evidence taken before the said grand jury, and thereby finds that the said Carrie Moore, defendant's said wife, then and there testified that the said defendant on several occasions shortly prior to the death of Emma Roberts, whipped and punished her to an immoderate degree with divers whips, leathern straps, sticks and instruments, and that he tied her up by the thumbs and cruelly hurt and injured her in divers ways; that independent of her testimony no indictment could or would have been found for the crime of murder by the grand jury as deponent verily believes; that at the time defendant was arraigned he had no counsel in attendance, and had no knowledge that his wife had been sworn before the grand jury which indicted him; that deponent was informed by the district attorney at the oyer and terminer, at which defendant was arraigned, that he did not intend to move the trial of the indictment at that term of court, and thereupon deponent returned home under the impression that no action was to be taken in the matter without deponent's presence, or without notifying deponent of any proposed action; that it was some time after said oyer and terminer before deponent ascertained that Carrie Moore was the wife of defendant, and not until some time after defendant had pleaded; that deponent was not present at the time defendant pleaded to the indictment; had no notice of the time of the arraignment and did not learn for a long time afterwards that he had pleaded.

W. HENRY DAVIS.

Sworn to before me, this 30th }
day of October, 1882. }

EDWARD G. PARKER,

Deputy Clerk.

STATE OF NEW YORK, } ss.:
CHAUTAUQUA COUNTY. }

Carrie Moore, being duly sworn, says she resides in the village of Jamestown, in said county; that in or about the year 1876, at the city of Rochester, Monroe county, New York, depo-

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nent was duly married to George Moore, of said Rochester, and ever since said time has been and now is his lawful wife; that at the time of marrying said Moore deponent was a single woman and had never previously been married, and has never since been married, and that the said George Moore is the only husband deponent has ever had, and the only man with whom deponent was ever united to in marriage; that deponent was married to said Moore, at the city of Rochester, by one Lacy, a Methodist minister of the gospel, who then resided in Rochester; that at the time of the alleged murder of Emma Roberts by the said George Moore, deponent was living with him, and knows of her own knowledge as to the alleged whipping, and that deponent knows that the said George Moore never whipped the said Emma to an unreasonable extent, and that when he did whip her it was for her misconduct and not for the purpose of simple cruelty; that the said Emma did not die in a number of weeks after she was whipped, and that her death was caused from scarlet fever, and that the whipping she received at said George's hands in no wise contributed to her death, as deponent believes; that said Emma Roberts told deponent shortly previous to her death that the sore upon her arm alleged to have been made by the whipping of said George Moore was caused by said Emma burning herself, and not otherwise; that the said Emma lived with deponent and her husband for about two months.

That as soon as she died the said George immediately notified her mother of the death. That the deponent believes that said George has been indicted at the instance of and through the malice of third persons, and particularly through the intermeddling of one Mary Harmon, of Lockport, who was and is unfriendly to deponent and her said husband, and, as deponent believes, circulated false reports with reference to the whipping and death of said child, solely for the purpose of making trouble for said George and this deponent. That said George is wholly and in all things innocent of the mur-

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der of said child, and that she died a natural death and not otherwise.

CARRIE MOORE.

Sworn and subscribed to before me, this }
 16th day of September, 1882. }

M. P. STRUNK, *J. P.*

STATE OF NEW YORK, } ss.:
 NIAGARA COUNTY, CITY OF LOCKPORT. }

George Moore, being duly sworn, says he is the defendant herein. That in or about the year 1876, he was duly married to one ———, now Carrie Moore, at the city of Rochester, N. Y., by the Rev. Mr. Lacy, a Methodist minister of the gospel. That deponent had never been married prior thereto and that the said Carrie is the only woman with whom deponent had ever been united to in marriage.

That at the time deponent pleaded to the indictment herein he had no knowledge of the fact that the said Carrie Moore, deponent's said wife, had been used as a witness against him before the grand jury. That deponent's counsel was not in attendance and deponent had no one to advise with at the time he pleaded. That the said Carrie Moore is now and ever since the said marriage has been the lawful wife of the said defendant.

GEORGE MOORE.

Sworn and subscribed to before me, this }
 30th day of October, 1882. }

EDWARD G. PARKER,
Deputy Clerk.

W. Henry Davis, for defendant, made and argued the following points :

I. Defendant's counsel moves that defendant may be allowed to withdraw his plea of "not guilty" for the purpose of a motion in his behalf to quash or set aside the indictment. (This was objected to by the district attorney, and objection overruled.)

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II. In order to attack an illegality not appearing upon the face of the indictment, a motion to quash or set aside the indictment would seem to be the proper practice (1 *Bish. Crim. Pro.* [3d ed.], sec. 763; *People* agt. *Shattuck*, 6 *Abb. N. C.*, 33; *N. S.* agt. *Coolidge*, 2 *Gall.*, 364; *Reg.* agt. *Hearn*, 9 *Cox Cr. Cases*, 433; *People* agt. *Hulbert*, 4 *Denio*, 136). Chief justice BRONSON said, in *People* agt. *Hulbert* (4 *Denio*, 136), "that the indictment when complete imparts absolute verity. It cannot be impeached except on motion for insufficient evidence, or any other fact or irregularity in the proceedings." In the same case (p. 136) the court further observed: "In *Low's case* (4 *Greenl.*, 439) so long as the record remains no defect in the evidence upon which it was founded, nor any irregularity in the proceedings, however great, can furnish an answer to it. But when the ends of justice require it a record may be set aside on motion, and when set aside that is the end of it" (*People* agt. *Restenblatt*, 1 *Abb. Pr.*, 268; 3 *Am. Law Reg.* [O. S.], 418; *People* agt. *Strong*, 1 *Abb. Pr.* [N. S.], 247, 249).

III. The grand jury is a constituent part of the court of oyer and terminer, and all the proceedings controlled, regulated and governed by the court of oyer and terminer, and this may be done after the grand jury has adjourned. (*People* agt. *Naughton*, 7 *Abb.* [N. S.], 421, 422, 424; 30 *How. Pr.*, 430; *State* agt. *Cowan*, 1 *Head.* [Tenn.], 280; *Clem.* agt. *State*, 33 *Ind.*, 418.) The evidence given before the grand jury constitutes a part of the record of the court (*State* agt. *Little*, 42 *Iowa*, 51). A court always takes judicial notice of its own record in the case (1 *Wharton on Ev.*, sec. 325). And this is so, though not brought before it by affidavit (*Crann* agt. *Smith*, L. R., 4 *Exch.*, 146).

IV. "The oath of the grand juror does not prohibit his testifying to what was done before the grand jury when the evidence is required for the purposes of public justice or the establishment of private right" (*Burnam* agt. *Hatfield*, 5 *Blackford* [Ind.], 21). The oath of the grand juror is no

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legal or moral infringement to his solemn examination, under the direction of a court, as to evidence before him, whenever it becomes material to the administration of justice (*State agt. Broughton*, 7 *Ired. [N. C.]*, 96, 100). This is a direct motion before the court in which the record remains to set aside or quash it; for that it is void in law, in that it was improperly and unlawfully procured by introducing as a witness the wife of defendant before the grand jury without the consent and against the will of defendant, and in violation of the statute in such case made and provided (*See 6 Abb. N. C.*, 34, 36). A witness may be indicted for perjury for false swearing before a grand jury, and grand jurors are competent witnesses to prove what he swore to before them (1 *Whar. Am. Crim. Law*, sec. 508).

V. Section 256 of the Code of Criminal Procedure, reads as follows: "The grand jury can receive none but legal evidence." Although the indictment in this case was found prior to the adoption of this Code, yet we perceive that this section (256) is but the reiteration of the common-law doctrine. No evidence should be presented to a grand jury which would not be legal and competent at the trial 'before the traverse jury (2 *Hawk. Pl. Cr.*, 353 [*Cumw. ed.*, book 2, chap. 25, secs. 138, 139]; 4 *Hawk. Pl. Cr. [Leach's ed.]*, 80, 81; *Denby's case*, 1 *Leach [4th ed.]*, 514). An indictment procured upon the knowledge of a grand juror, without his being sworn, is void, and upon a motion for that purpose should be quashed (4 *Hawk. Pl. Cr.*, 82 [*Leach's ed.*, book 2, chap. 145, note]; 2 *id. [Cumw. ed.]*, 354, note). The rule is thus laid down. A grand jury ought not to find an indictment upon the evidence of incompetent witnesses, and where an indictment was found upon the testimony of witnesses who had been convicted of an infamous crime, the court told them they ought not to have done so, the witnesses competency having been destroyed (*MS.*). In one case the indictment was quashed because the witnesses before the grand jury were not properly sworn (6 *Car & P.*, 90; 25 *Eng. C. L.*, 336). In the *U. S. agt. Cool-*

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idge (2 *Gallison*, 364), the indictment was quashed by judge STORY, for the reason that one of the witnesses before the grand jury was not sworn (see opinion of the court at p. 367). An indictment should be quashed when it appears by affidavit that it was found by the grand jury without adequate evidence to sustain it (*People* agt. *Restenblatt*, 1 *Abb. Pr.*, 268; 3 *Am. L. Reg.*, 248, 249; *People* agt. *Hylar*, 2 *Parker*, 570). If any illegal evidence has been introduced before the grand jury which bears in the smallest degree upon the final result of their deliberations, it cannot properly be disregarded, and the indictment should be set aside (*Worrall* agt. *Parmlee*, 1 *N. Y.*, 519; *Anderson* agt. *Rome, &c.*, 54 *N. Y.*, 334; *Baird* agt. *Gillett*, 47 *N. Y.*, 186). Since the decision of the case of the *People* agt. *Briggs* (60 *How. Pr.*, 17), deciding the incompetency of the wife as a voluntary witness against the husband (*per judge* OSBORN), the same question has been decided the same way in the case of *Byrd* agt. *The State* (57 *Miss.*, 243), reported since judge OSBORN's decision. See, also, *People* agt. *Crandan* (17 *Hun*, 490), which holds directly that the wife is not a competent witness in a criminal action against her husband. Any defect which, in any stage of a criminal proceeding will vitiate the indictment, may be taken advantage of by plea in abatement (2 *Hales' Plg. of the Cr.*, 236). Any defect or irregularity appearing upon the face of the indictment or upon some matter of fact extrinsic of the record, may be cured by plea in abatement to quash (1 *Bish. Cr. Pr.*, 416).

The testimony of defendant's wife before the grand jury was well calculated to prejudice that body against defendant, for she relates with somewhat of detail, the facts and circumstances under which her husband committed the worst of human crimes, wholly without motive. In the absence of her testimony it would seem unreasonable to suppose, and unfair to conclude, that the defendant would have been indicted for the crime of murder. The very presence of the wife before the jury asseverating to those facts, so incriminative in their

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nature, and taking place in the privacy of her home, was well calculated to exercise a most potent and improper influence. It would seem to be a sort of trifling with or mockery of the precepts of the law, and the practice of the courts, to attempt to extenuate so grave an error. The wife being in no wise a competent witness, and her testimony before the grand inquest being so vitally material, and the indictment demanding a punishment so dreadful, it would seem proper that it should be set aside.

At an adjourned term of the Niagara circuit court and court of oyer and terminer, held at the court-house at the city of Lockport, in and for the county of Niagara, on the 30th day of October, 1882.

Present — Hon. ALBERT HAIGHT, *Justice Supreme Court.*

The grand jury, at a previous term of this court, having found a bill of indictment against the defendant for the crime of murder, and the defendant having moved, on the affidavits of W. Henry Davis, George Moore and Carrie Moore, and the admissions of the district attorney as to the testimony given before the grand jury, and that the defendant and Carrie Moore were husband and wife at the time of the finding of the bill of indictment herein against defendant, and that the said Carrie Moore was sworn and gave material testimony before the grand jury.

Now, after reading said affidavits and the testimony given before the grand jury, by which it appears that Carrie Moore, the wife of the said defendant, was sworn as a witness in behalf of the people against her said husband, before said grand jury, on the investigation of the charges against the defendant, whereon the indictment was found, and that said Carrie Moore, among other things, testified on such hearing before said grand jury, that said defendant, from time to time, between the 16th day of November, 1878, and the 8th day of December, 1878, whipped, misused and maltreated Emma Roberts, in a cruel and inhuman manner, and the

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question before said grand jury being whether or not the said defendant killed said Emma Roberts by said whipping, misuse and maltreatment, and the said indictment having been in part based and founded upon such incompetent evidence, and after hearing W. Henry Davis, of counsel for the defendant, and Mr. Ashley, district attorney of Niagara county, in opposition thereto, it is

Ordered and adjudged that said indictment be and the same hereby is quashed or set aside, and the prisoner remanded to await the action of another grand jury.

N. Y. SURROGATE'S COURT.

In the Matter of EDWARD HEWITT's estate.

Costs on appeal from surrogate's courts—Power of surrogate to award compensation to special guardians—Code of Civil Procedure, sections 2558, 2565, 2566, 2557, 2589, 2560.

Except where an appellate tribunal has given directions in the premises, the surrogate has no power to award compensation to special guardians for services rendered by them as such special guardians in proceedings on appeal from orders or decrees of this court; nor with that exception has he any power to make to them or to any other persons in their capacity as parties to such proceedings any award as costs or allowances.

Decided, May, 1883.

ROLLINS, J.—An instrument purporting to be the last will of Edward Hewitt was in the year 1881 offered for probate in this court. A contest thereupon arose which resulted adversely to the proponents. While that contest was pending the applicant in the present proceeding was appointed special guardian of decedent's minor children. He represented them in the probate controversy, and by the surrogate's decree was allowed as compensation therefor the sum of twenty-five dollars, which he has since received.

From this decree, which denied probate to the paper pro-

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pounded as a will, an appeal was taken to the supreme court. A judgment of affirmance was there pronounced, which was itself subsequently affirmed by the court of appeals.

The special guardian alleges that during the pendency of these appellate proceedings he rendered services which are worthy of compensation, and he now asks that such compensation be awarded him out of the assets of the estate. In opposition to this claim it is urged that the functions of the applicant as special guardian ceased with the entry of the surrogate's decree, and that he was neither required nor empowered by virtue of his office to represent the infants thereafter. This view, as it seems to me, is correct. If the interests of an infant need protection in proceedings upon appeal from the surrogate, it is the province of the appellate court to appoint for that purpose a guardian *ad litem* (*Kellinger* agt. *Roe*, 7 *Paige*, 363; *Underhill* agt. *Dennis*, 9 *Paige*, 209; *Chaffee* agt. *Baptist Miss. Soc.*, 10 *Paige*, 89; *Moody* agt. *Gleason*, 7 *Cow.*, 482; *Fish* agt. *Ferris*, 3 *E. D. Smith*, 567).

It is doubtless true that if an appellate court, though it has made no formal selection of a guardian *ad litem*, has nevertheless practically recognized as such one who has acted as special guardian before the surrogate, the person so recognized may become thereby entitled to compensation.

In the case at bar, for example, the moving party for aught that is disclosed by the papers before me may have been treated by the appellate court as one entitled to represent the infants whose interest in the surrogate's court he had, as special guardian, been bound to protect. Accordingly his claim to be compensated for services rendered in the proceedings upon appeal may have quite as good a foundation as if he had received an express appointment as guardian *ad litem*. But, however meritorious his claim may be, it cannot be enforced here. He must resort for relief to the appellate tribunals wherein he rendered the services. In the absence of directions from those tribunals, the surrogate has no authority to make any provision for his compensation.

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Before the enactment of the Code of Civil Procedure the statutes were silent both as to the amount which special guardians should receive in payment for their services and as to the mode of procedure whereby payment for such services could be obtained. But it was in practice assumed that the right of the surrogate to appoint those officers involved the right to direct the payment to them of reasonable compensation. Any question as to the authority to give such direction seems to be now set at rest by the provisions of the Code.

Sections 2558-2565, inclusive, have to do with costs and allowances to executors, administrators, freeholders, appraisers, &c. Then follows section 2566, which declares that "each other officer including a referee and each witness is entitled to the same fees for his services * * * as he is allowed for like services in the supreme court."

While there is here no express mention of special guardians, the language is broad enough to cover such officers, and was intended, I think, to include them.

Now, if their right to be awarded compensation by the surrogate depends solely upon the authority which this section confers, such award can only be made for services rendered in this court.

Aside from the section which has just been quoted, the only Code provisions which have any important bearing upon the matter under discussion, are sections 2557, 2558, 2560 and 2589, which relate to costs awardable to parties in proceedings before the surrogate and on appeal from that court. If, therefore, a special guardian's right to compensation is not to be tested by section 2566 alone, it is because the several sections above cited enlarge the authority of the surrogate and permit him to grant an application like the present, even though no direction has been given by the supreme court or the court of appeals.

It is true that those sections contain expressions which fairly suggest the liberal interpretation here claimed for them—especially when considered by themselves, apart from other

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Code provisions *in pari materia*, and without reference to the state of the law upon this subject prior to September 1, 1880.

But if due heed be paid to the entire scheme of appellate procedure established by the Code and to the general policy of the statutes before its enactment, it will be found that the claim here set up cannot be successfully maintained, and that under no circumstances can the surrogate order payment of appeal costs, save in obedience to the directions of an appellate court.

That he was confined within those limits just before the Code went into operation is too well settled to require discussion (*Morgan* agt. *Morgan*, 1 *Abb. Pr.* [*N. S.*], 40; *Seguine* agt. *Seguine*, 3 *Abb. Pr.* [*N. S.*], 442; *Dupuy* agt. *Wurtz*, 47 *How. Pr.*, 225; *Savage* agt. *Gould*, 60 *How. Pr.*, 255).

What change, if any, has since been effected? The Code declares, by its 2557th section, that "except where special provision is otherwise made by law, costs awarded by a decree may be made payable by the party personally, or out of the estate or fund where justice requires."

Manifestly no authority is here given or intended to be given for the award of costs, either upon the appeal or otherwise. The sole purpose of the section is to declare what person or fund is to be made chargeable with costs in cases where such costs are awarded. "Whenever you lawfully direct that costs be paid," it says to the surrogate, "you are at liberty unless prevented by some positive statutory restriction, to exercise your discretion as justice may require in directing that such costs be paid either by some party or parties to the proceeding or out of the estate or fund." Section 2558 provides that the award of costs in a decree is in the discretion of the surrogate, except in one of the following cases."

Then follow the exceptions :

1. When special directions respecting the award of costs are contained in a judgment or order made (a) upon an appeal from the surrogate's determination, or (b) upon a motion for

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a new trial of questions of fact tried by a jury (in which cases costs must be awarded according to those directions).

2. When a question of fact has been tried by a jury. In such a case, unless an appellate court has given special directions, costs must be allowed to the successful party.

3. When there is a controversy over the probate of a will. The surrogate is prohibited in such a case from granting costs to unsuccessful contestants, save for certain specified exceptions.

Section 2560 declares that the costs of an appeal, where they are awarded by the surrogate, shall be the same as if they were awarded in the supreme court.

These two sections (2558 and 2560), when compared with section 2589, which will be presently quoted, and when the policy of the law, as it was clearly settled before the enactment of the Code is taken into consideration, will be found to demand a narrower interpretation than that which the present applicant seeks to put upon them. While they provide, among other things, for the adjustment in surrogate's decrees of costs in appeal proceedings, it is not their intention, as it seems to me, to give the surrogate any power to *award* such costs, in the strict sense of that term; in other words, they do not aim to enlarge the scope of his authority so as to enable him to *adjudge* that costs be paid when the court above has refused to award them or given no direction whatever, they are simply designed to establish the mode whereby the surrogate is enabled to exercise in respect to costs on appeal such limited authority as is conferred upon him by other provisions of law.

The two sections which are the immediate subject of discussion form a part of article 3 of title 2 of chapter 18 of the Code. The chapter treats of "surrogate's courts and proceedings therein." The title is devoted to "provisions relating generally to the proceedings in surrogates' courts *and to appeals from those courts.*" The article is entitled, "Decrees and orders and the enforcement thereof. Costs and fees." The article which immediately follows treats solely of

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"*appeals*." This arrangement of topics is in thorough harmony with the view I have suggested, that sections 2558 and 2560 in the third article are intended to affect in no manner the question of the surrogate's right to award costs on appeal, but only to provide for their insertion in a decree in cases where they may lawfully awarded.

The correctness of this view becomes very apparent upon reference to section 2589, one of the sections of article 4, which, as has been stated already, is devoted solely to "appeals."

That section provides that *the appellate court* may award to the successful party the costs of an appeal, or may direct that costs shall abide the event of a new trial, or of subsequent proceedings in the surrogate's court. The section further declares that in either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court, or, if such a direction is not given, as directed by the surrogate.

This means, I take it, not that if an appellate court fails to award appeal costs the surrogate is at liberty to award them, but that if an appellate court does award costs and gives no direction whether the same shall be paid out of the estate or fund, or by the unsuccessful party, the surrogate may exercise his discretion in the particulars wherein the appellate court has failed to exercise its own.

This construction of section 2589 is in strict harmony with the interpretation I have put upon section 2558, and both sections are thus made accordant with the statutes in force before the Code was enacted, and with what must certainly be regarded as the most sensible procedure for regulating the award of costs on appeal.

Application denied.

Sherwood *et al.* agt. 'Travelers' Insurance Company of Hartford.

N. Y. COMMON PLEAS.

MARY SHERWOOD *et al.* respondents, agt. THE TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONN., appellant.

Costs in district courts — On appeal to common pleas to whom they belong — May be taxed as disbursements — Code of Civil Procedure, sections 8050, 8058, 8060.

Costs paid by the appellant to the justice or his clerk, on an appeal from a district court of this city, belong to the prevailing party before the justice, and should be paid to him. The costs awarded by the justice are not designed to be held as a deposit to await the result of the appeal, but should be taxed as disbursements of the appeal in case of reversal, as provided by section 8060 of the Code of Civil Procedure

General Term, May, 1883.

THE plaintiffs recovered a judgment in the district court on January 5, 1882, against the defendants for sixty dollars and seventeen dollars and fifty cents costs. Prior to January 20, 1882, the defendants appealed to the general term of this court, serving notice of appeal and giving the undertaking prescribed to stay execution. The defendants then paid to the clerk of the district court the costs and fee for a return. The judgment was reversed, with costs. The appellant thereafter demanded the seventeen dollars and fifty cents costs, which had been paid to the clerk when the appeal was taken, and on default of payment, moved in this court at chambers for an order directing the clerk to pay the money. On motion it appeared that the clerk had paid the amount to plaintiff's attorney, January 28, 1882. The court below granted the motion, and the clerk appealed to this court.

Charles E. Bigelow, appellant, in person.

F. R. Mathers, for respondent.

BEACH, J.—I have been unable to find any adjudication bearing upon the question. In *Ex parte Stephens* agt. *The Saratoga Common Pleas* (1 Wend., 282), the court go no further than to decide that the method of appeal must be strictly

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followed, and payment of costs to the party instead of the justice was not a compliance with the statute. The appellant, if costs are awarded him on the appeal, may pay, among other items, the costs and fee paid to the justice upon taking the appeal (*Code of Civ. Pro.*, sec. 3060). The authority to include these costs among the disbursements on appeal seems to contemplate a prior disposition of them by the justice or his clerk. The only one possible is a payment to the successful party in the district court, as they certainly do not belong to either of those officials, and, if to rest on deposit, no necessity existed for such a provision. I do not think the giving of an undertaking affects the question, for its purpose does not reach beyond a stay of execution (*Code of Civ. Proc.*, sec. 3050). Neither can these costs fall within section 3058. They are not property lost by means of the erroneous judgment, because not taken from the party under the judgment, but paid as one of the steps needful to perfect his appeal.

The order should be reversed, with costs and disbursements.

N. Y. SUPREME COURT.

In the Matter of the proceeding of ANN SCHROEDER for the custody of her infant children GEORGE E. and ANNA L. CANTY.

Section of Code, when takes effect — Deeding infant children — The test by the court — Code of Civil Procedure, sections 2851, 3356.

The provisions of section 2851 of the Code of Civil Procedure, by section 3356, did not go into effect until September 1, 1880.

Instrument deeding infant children must now be recorded within three months after the decease of the grantor to secure and preserve its validity. The security, good conduct and well being of infant children are the important considerations to be regarded, and where those ends can only be best accomplished by depriving the mother of their custody, it is the uniform practice of the courts to give such a direction.

First Department, General Term, March, 1883.

Before DAVIS, C. J., BRADY and DANIELS, JJ.

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ANN SCHROEDER, formerly Ann Canty, brought *habeas corpus* proceedings to recover the possession of her two infant children which she claimed were illegally withheld from her by their aunts. The respondents made return that they held the children by virtue of an agreement signed by the father of the children and the relator, their mother. The facts will be sufficiently found in the opinion. The special term judge dismissed the writ on the merits, with costs.

George H. Hart, attorney for the petitioner, appellant, made and argued the following points:

I. The appointment of the respondents as guardians by the indenture purporting to be executed by the relator and her deceased husband is ineffectual. It is a nullity because the instrument was not recorded as is required by law, and the trust was never accepted but in effect was renounced (*Code of Civil Proc.*, sec. 2851).

II. If the instrument verified by itself is of legal value, it is invalid and ineffectual if it be the fruit of undue influence (*Limburger agt. Rawch*, 2 Abb. Pr. [N. S.], 279; *Matter of Paige*, 62 Barb., 476; *Clarke agt. Sawyer*, 2 N. Y., 498).

III. Whatever rights the parents, or either of them, had to dispose of the children by deed, such right being exercised, it is revocable at their pleasure, although it is insisted that such deed is inoperative during the life of the grantor (*Tyler on Infancy and Coverture* [2d ed.], 247).

IV. The relator, as the mother and surviving parent of the children was entitled, as an absolute right, either to a judgment directing the immediate delivery to her of her children because of the failure of the respondents to show that they had recorded the deed as required by law, or else to an examination into the issues raised (*Hand on Habeas Corpus*, 528; *Tyler on Infancy and Coverture*, 240).

J. C. Julius Langbein, attorney for respondents, made and argued the following points:

I. The order dismissing the writ of *habeas corpus* rested in

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the sound judicial discretion of the court, and such discretion was properly exercised upon the papers and proofs presented. Whethen the court shall direct an infant to be delivered over to any particular person, even the father who is first entitled, rests in its judicial discretion (*Matter of McDonle*, 8 Johns., 382; *Matter of Waldron*, 13 Johns., 418; *People* agt. *Mercier*, 8 Paige, 47; *Matter of Murphy*, 12 How., 513; *People* agt. *Kling*, 6 Barb., 366; *People* agt. *Olmstead*, 27 Barb., 9; *In re Clifton*, 47 How., 172). The future welfare and interest of the infant, without regard to mere legal right, is the test by the court, and this is so purely a matter of discretion that it will not be reviewed on appeal, except in case of manifest error or abuse of discretion (*Ex parte Welch*, 74 N. Y., 299).

II. Irrespective of the strict legality as to the execution of the agreement by which the custody, tuition and education of the children were committed to the respondents, their welfare, interest and happiness will be best promoted in the future, as it has been in the past, by allowing them to remain as contemplated and expressed in the agreement with their aunts (*Matter of Murphy*, 12 How., 513; *Matter of Watson*, 10 Abb. N. C., 216; *Wilcox* agt. *Wilcox*, 14 N. Y., 575).

DANIELS, J. — The children whose custody is in controversy are a son of the applicant, who is nearly of the age of eight years, and a daughter nearly the age of seven years at the time when the order was made from which the appeal has been taken. They had resided with the respondents, who were sisters of their father, for more than three years preceeding the day of his decease, which was on the 6th day of July, 1879.

He was at their residence during his last sickness, and he was supported, nursed and cared for by them; and on or about the 2d day of July, 1879, he, together with the petitioner, the mother of the children, executed an instrument under seal committing the custody, tuition and education of

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the children during their minority to his sisters, the respondents, and under that instrument the children were supported and cared for by the respondents to the time of the hearing in December, 1882, when the order from which the appeal has been taken was made. This instrument has been objected to as ineffectual under section 2851 of the Code of Civil Procedure, because of the omission to record it. But by section 3356 the provision requiring such an instrument to be recorded within three months after the decease of the grantor to secure and preserve its validity, did not go into effect before the 1st day of September, 1882. It consequently could not include the instrument executed by the father and mother of these two children. That seems to have been made under the authority of the preceding statute empowering the father of a minor child to dispose of his or her custody and tuition during his minority, or for any less period of time, by his deed or last will duly executed (3 *R. S.* [6th *ed.*], 167, *sec. 1*). Under the authority of this section it was not required that the mother should join in the execution of the instrument. But the fact that she did so, could in no manner deprive it of effect, for it was still the deed of the father designed to take effect upon his own decease, which took place in a few days afterwards. But even if it should be held that the instrument itself for any cause was inoperative, still the facts as they were made to appear on the hearing would deprive the applicant of the custody of the children.

It was alleged, and not denied, that she had been in the habit of quarreling with her husband, when the children would be taken to the home of his sisters, and left there with them. That the applicant at times left her home and remained away for two or three weeks, during which she did not give the children a mother's care or attention. That she has been arrested several times since her husband's death for disorderly conduct, and that it was the dying wish of the father of the children that their care and custody should be committed to the respondents, and the children themselves have no desire

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to leave them, but remain there. It is only reasonable to presume, from the circumstances, that the children could not be committed to the custody of their mother without danger to their morals, as well as their health and personal safety.

That they are better cared for, provided for and protected by the respondents than they could be by her, is free from all reasonable grounds of doubt. And the law will not interpose under such circumstances to remove infant children from a comfortable home provided for them, as their present residence has been, and commit them to the care and custody of their mother, where both safety and their morals would evidently be endangered by such an interposition. Under ordinary circumstances the mother, after the decease of the father, is entitled to the custody of her infant children. For it is presumed that they will be well cared for and protected in all respects by her. But when the facts disclosed in the controversy for their custody are such as to remove this presumption, and to justify the conclusion that it has no foundation in the particular case, then when they are properly cared for by others, to whom their custody may have been committed, the law will not interfere in her behalf. The security, good conduct and well being of the children are the important considerations to be regarded, and where those ends can only be best accomplished by depriving the mother of their custody, it is the uniform practice of the courts to give such a direction (*Matter of Murphy*, 12 How., 513; *Matter of Clifton*, 47 id., 172; *Matter of Watson*, 10 Abb. N. S., 215).

As the facts were presented by the return to the writ, and its traverse of so much of it was denied by the applicant, the order was correct, and it should be affirmed with the usual costs and disbursements.

DAVIS, C. J., and BRADY, J., concurred.

Tim agt. Smith.

N. Y. COMMON PLEAS.

LOUIS TIM and others, appellants, agt. CLINTON H. SMITH,
respondent.

THOMAS BOYD and others, appellants, agt. CLINTON H. SMITH,
respondent.

Attachment — What must be shown by creditors who obtain an attachment and move to vacate a prior attachment before the persons holding the prior attachment can be called upon to justify their own proceedings.

Where a creditor who obtains an attachment against the property of defendant moves to vacate a prior attachment in another action against the defendant, the plaintiff in the process attacked has a right to claim that legal evidence of the existence of the subsequent lien shall be furnished before he can be called upon to justify his own proceedings.

General Term, May 1883.

ON the 9th day of March, 1882, the plaintiffs obtained an attachment against the property of the defendant in an action, as recited in the attachment, to recover "damages for injury to personal property of plaintiffs, in consequence of the negligence and fraud of defendant in fraudulently procuring credit of plaintiffs for goods sold and delivered to defendant, and affidavit showing that the defendant is a natural person, who has assigned, disposed of and secreted, and is about to assign, dispose of and secrete his property with intent to hinder and delay his creditors and plaintiffs."

The affidavits upon which this attachment was issued showed that the defendant applied to the plaintiffs for the purchase of merchandise on credit at various times between the 1st day of October, 1881, and the 1st day of February, 1882, and that between these dates the plaintiffs sold and delivered to the defendant merchandise amounting in the aggregate to \$4,368.75, upon a credit of sixty days from February 1, 1882.

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The affidavit further shows that in order to induce the plaintiffs to sell and deliver the merchandise about the time of the purchase thereof, the defendant stated to the plaintiffs that he was doing an excellent business, was making money, was perfectly solvent, and in excellent financial condition, and that relying upon the truth of these statements the plaintiffs sold and delivered said merchandise on credit.

The affidavit further states that within a few days after the last delivery of said merchandise the defendant failed in business and made a general assignment, giving preferences, as appears by the assignment, of over fifty thousand dollars.

The affidavit further states that the statements and representations above mentioned were false, and that since the failure the defendant has admitted to the plaintiffs that they were false.

Subsequently, upon the affidavit of an attorney, stating that he was the attorney in an action brought in this court, in which Nicholas Schroeder and Henry C. Seavers were plaintiffs and the above named defendant was defendant, and that on the 17th of March, 1882, an attachment was granted in said action and duly issued to the sheriff, who has by virtue thereof attached the property of said defendant, and that said attachment was in force and said action pending, and that the attachment in this action constitutes a lien upon the defendant's property prior to the attachment mentioned in said affidavit. A motion was made to vacate the attachment herein upon the ground of the insufficiency of the affidavits upon which it was founded, which motion was granted, and from the order granting such motion this appeal is taken.

Daniel Clark Briggs and Otto Norwitz, for plaintiffs, appellants.

Alexander Blumensteil and Samuel Greenbaum, for subsequent attaching creditors, respondents.

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VAN BRUNT, *J.* — One of the questions which was argued upon this appeal, and the only one which I deem it necessary to consider, is that the moving papers in this case did not show that any valid attachment had been obtained by the moving creditors, and that therefore this motion could not be entertained. In order that this motion may be made, the party moving must have acquired a lien upon or interest in the property attached. This fact must appear to the court, by competent evidence, before it can acquire jurisdiction to entertain this motion. The only proof in this action of the subsequent lien of the moving party is an affidavit by an attorney that an attachment was granted in an action in which the moving party was plaintiff against the property of the defendant herein; the grounds of the attachment do not appear. Whether the papers upon which it is granted conferred jurisdiction upon the judge granting the attachment, is not disclosed, and for aught that appears upon the record, the attachment of the moving party may have been founded upon the same facts upon which the plaintiffs herein claimed to maintain their attachment; and we may have presented to us as a result of this motion the vacation of an attachment by an alleged subsequent lienor, whose alleged lien is acquired by an attachment having less legal foundation than the one sought to be set aside. It seems to me that in the face of an objection raising the point, the party moved against has the right to insist upon strict legal proof of the subsequent lien, so that he can attack the same because of defects therein. It cannot be but that the party moved against has the right to question the validity of the subsequent lien, because the papers upon which it was granted do not confer jurisdiction upon the court precisely in the same manner as the alleged subsequent lienor is attempting to set aside the prior attachment.

It is well established that if the sheriff wishes to justify the taking of personal property under an attachment, he must show that the attachment is regularly issued by the production of the papers upon which it is founded; so here, if the

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party claims a lien by virtue of process, he must show that the process was regularly issued.

It is claimed, upon the part of the respondent, that the case of *Ruppert agt. Haug* (87 N. Y., 141) is opposed to the view above expressed. Certainly language is used, in the opinion of the court, which sustains this claim; but an examination of the case shows that but one question was considered as to the *status* of the moving party, and that was that it did not sufficiently appear by the affidavit of the moving party that the two processes were levied upon the same property, which was necessary to appear in order to give the moving party a standing in court. This is the only question in that regard decided by the court; and when they say that, in all respects, the affidavit of the moving party was sufficient to give him a standing in court, they had in mind only the point which had been raised as to the sufficiency of the affidavits, viz., the identity of the property levied upon.

In the case at bar, the objection is raised at once that there is nothing whatever to show that the court had any jurisdiction to issue the subsequent attachment, or that such attachment, when levied, gave the plaintiff therein any lien upon the defendant's property which authorized them to make the motion to set aside the plaintiff's prior attachment herein.

As far as I have been able to examine the adjudications, the question now presented has never been raised; but it seems to me that the plaintiffs in the process attacked, have a right to claim that legal evidence of the existence of the subsequent lien shall be furnished before they can be called upon to justify their own proceedings, and that they may insist that the moving lienor shall show to the court that his process, at least, is regular, and has a better foundation than the process attacked.

The order should be reversed, with costs and disbursements.

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N. Y. MARINE COURT.

E. VALIENTE and another agt. JAMES BRYAN.

Supplementary proceedings—What costs are collectible by execution under section 779 of the Code of Civil Procedure.

Where supplementary proceedings were instituted upon return of an execution, and during the course of the proceeding ten dollars costs were allowed by the judge, and also the further sum of thirty dollars at the close of the examination, when a receiver was appointed:

Held, that the ten dollars allowed by the court are clearly motion costs and are collectible by execution.

Held, further, that in supplementary proceedings the final costs cannot be deemed motion costs, and are not, therefore, collectible by execution.

Special Term, April, 1883.

HAWES, J.—Supplementary proceedings were instituted upon return of execution in this action, and during the course of the proceeding ten dollars costs were allowed by the judge, and also the further sum of thirty dollars at the close of the examination, when a receiver was appointed. The plaintiff has issued a precept to the sheriff to recover these costs, and the present motion is to vacate this precept. Under the provision of the Laws of 1840, chapter 386, and the Laws of 1847, chapter 390, a precept could be issued to collect costs, if based upon an order of the court, but these were strictly motion costs (*Wesley agt. Bennett*, 6 Abb. 12). The provisions of the act of 1840 allowed an attachment against the person, but this provision was, in the main, repealed by the act of 1847, which allowed a *fiery facias* to issue for their collection, and it may be said in general terms that the one was a substitution of process against property for one against the person. The law of 1847 was repealed by chapter 417 of the Laws of 1877, and not being re-enacted by the Code there was no provision for their collection by execution or precept under the provision of section 779 prior to the enactment of 1882 (*McCulloch agt. Hoffman*, 1 Law Bulletin, 26). The

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amendment of section 779, passed July 1, 1882, re-enacts in substance the provision of the Laws of 1847, and now allows an execution to issue for the collection of motion costs. The ten dollars allowed by the court are clearly motion costs and are collectible by execution, and I know of no rule which would prevent collection by such a remedy in a special proceeding as well as in actions. The Code in that regard makes no distinction that I am aware of. The only possible question is as to the classification which should be given to the thirty dollars costs allowed on the appointment of a receiver. The law of 1847 provided that process in the nature of a *fiery facias* against personal property may be issued for the collection of "costs founded on an order of court." The question of the right to issue a writ for the collection of the thirty dollars costs in supplementary proceedings was fully discussed in the case of *Halsaver agt. Wilas* (11 *How.*, 450), and it was there held that, inasmuch as supplementary proceedings were special proceedings, the order then made by the judge was not an "order of court," but was merely an order of the judge, and did not, therefore, fall within the provision of the statute. It will be noticed that no such restriction exists in section 779 of the Code, but only refers to "costs of a motion directed by an order." It is clear, therefore, that an order of a judge is as good a foundation for such a writ as an order of the court.

The question therefore returns as to whether the thirty dollars costs allowed to plaintiff for costs of this proceeding are to be deemed "costs of a motion directed by an order." The legal history of this provision of the Code is very voluminous, and many nice distinctions have been drawn; but I am inclined to think that the motion costs referred to in this section are confined strictly to the class of motions which were first allowed under the statute of 1840, and which statute required the justices of the supreme court to regulate by rule the amount to be allowed upon granting or denying motions. This amount was fixed at that time at ten dollars to the moving

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party and seven dollars to the opposing party if successful, and in peculiar cases the costs to either party might be allowed to an amount not exceeding twenty dollars. The Codes of 1848 and 1849 severally modified the rule and provided that costs might be allowed on motions in the discretion of the court not exceeding ten dollars. These provisions of the statute, upon which section 779 is founded, clearly had no reference to statutory or taxable costs, but were special motion costs allowed in the progress of the litigation and collectible at once. If this is the correct view of the intent of the statute, I do not see how the thirty dollars costs can come within the provisions of section 779, although they are directed by an order to be paid. This allowance of thirty dollars is granted by virtue of the statute, and are the final costs in the proceeding and are payable out of any money which has come, or may come, into the hands of the receiver (*sec. 2455 of Code*), or it may be directed to be paid by the judgment debtor, if so set forth in the order. This would seem to establish a method of collection, and in the nature of things would impliedly preclude its collection in any other way. Specific provision for the collection of final costs which may, perhaps, be deemed tantamount to judgment costs in various special proceedings, are provided for. Section 2250 establishes the costs to be allowed in summary proceedings, and expressly allows their collection by execution.

Section 2556 allows costs in surrogate's court to be collected by execution. In supplementary proceedings the final costs cannot be deemed motion costs, and are not, therefore, collectible by execution. The execution, therefore, will be modified in that respect. The examination was regularly adjourned to February sixteenth, and it appeared from the uncontradicted affidavit of plaintiffs' attorney that the application was made on that day, although the order was not entered until the twentieth instant. The appointment of the receiver was therefore regular.

Motion granted, unless modified as above.

Manolt agt. Petrie *et al.*

N. Y. SUPERIOR COURT.

ELIZABETH L. MANOLT agt. ELIZABETH L. PETRIE *et al.*

Ejectment — Adjudication that a deed though absolute on its face was a mortgage — Who and to what extent bound by it — Adverse possession by one claiming under a life tenant cannot be had against a remainderman during the life of the life tenant

A. having an eighth interest in certain lands, subject to a life estate in B., made a conveyance of his interest to B. Thereafter A. died, leaving the plaintiff, his widow and three children him surviving; thereafter one of said three children died, leaving this plaintiff, his mother, and a brother and sister him surviving.

Thereafter B. died, and a partition suit was thereupon instituted, to which plaintiff was not a party, wherein it was adjudged that the conveyance from A. to B. was a mortgage.

Held, that the judgment that the conveyance from A. to B. was a mortgage was binding on the purchasers at the partition sale and those claiming under them.

Second, that the plaintiff inherited a life estate as heir of her said deceased son.

Third, that one claiming under the life tenant cannot have adverse possession against a remainderman during the life of the life tenant.

Special Term, May, 1883.

Horace Barnard, for plaintiff.

John Bradner Perry, for defendant.

INGRAHAM. *J.* — This is an action of ejectment, tried before the court without a jury at the Special Term. By the will of George Manolt, admitted to probate on the 21st of October, 1828, a life estate in the premises in question was devised to his wife Mary Manholt, and a vested remainder in fee to the children of his brother Jacob Manolt. These children were eight in number, each of them taking an undivided eighth in said premises, subject to the life estate. The life estate determined by the death of the life tenant July 28, 1872. On July

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18, 1854, and subsequent to the arrival of the youngest child of said Jacob Manolt at age, George J. Manolt, one of the children of Jacob Manolt and the owner of an undivided eighth of the remainder of the premises in question, with his wife, the plaintiff herein, executed an instrument which was in form an absolute conveyance, and which purported to convey to the life tenant, Mary Manolt Lyon (she having married Daniel Lyon), in consideration of \$3,000 all the right, title and interest in and to certain premises in the city of New York, including the premises in question, and that subsequently the said Mary Manolt executed an instrument in writing, dated 28th day of March, 1856, purporting to be a bargain and sale deed, and to convey, in consideration of \$7,873.93, to one Jonathan Odell all her right, title and interest in and to the premises conveyed by said instrument executed by George J. Manolt, and which included the premises in question. Subsequently, and on the 4th day of March, 1856, the said George J. Manolt died intestate, leaving him surviving his widow, the plaintiff in this action, and three children, Elizabeth A., Lewis J. and George T. Manolt, his only heirs-at-law.

It will thus appear that subject to the effect of the conveyance of July, 18, 1854, each of the children of said George J. Manolt became the owners of a vested remainder in one undivided twenty-fourth part of the premises in question.

On July 29, 1861, George T. Manolt died unmarried and intestate, leaving him surviving his mother, the plaintiff in this action, and his brother and sister, his only heirs-at-law. Whatever interest said George T. Manolt had in the premises in question descended to his mother, the plaintiff, for her life, with a remainder over after her death to his brother and sister (1 *R. S.*, 752, *sec.* 6). The question, therefore, to be determined is, what estate, if any, did George T. Manolt have in the premises in question at the time of his death?

Mary Manolt Lyon, the life tenant, died in the year 1872, and on September 13, 1872, an action was commenced in the

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supreme court to partition the property in question ; plaintiff was not a party to that action.

By the answer of Elizabeth A. Manolt and Lewis J. Manolt in that action, it was alleged that the deed given to Mary Manolt Lyon by George J. Manolt, dated July 18, 1854, was not a conveyance of the premises therein described, but that the same was given without consideration, and the issues raised by that answer was referred to Philo T. Ruggles, Esq., as referee, to hear and determine the same.

On the trial of that action it was stipulated between Jonathan Odell, who was a party defendant, and to whom all the interest under the said deed has been conveyed, and the defendants therein, Elizabeth A. Manolt and Lewis J. Manolt, that the said deed, though absolute on its face, was in fact a mortgage given to secure the sum of \$3,000, and the referee reported such to be the fact, and that there was due on the said mortgage the sum of \$6,941.53, and that that amount was a lien upon the share of the said Elizabeth A. Manolt and Lewis J. Manolt.

Judgment was subsequently entered confirming the report, and adjudging that the defendants, Elizabeth A. Manolt and Lewis J. Manolt, are each seized in fee simple and entitled to one undivided sixteenth part of said lands and tenements, subject to the payment of the amount due to said Jonathan Odell on his equitable mortgage of \$6,941.53, and ordering the property sold by a referee ; that out of the proceeds of the sale of the said undivided eighth of the said premises the said sum of \$6,941.53 be paid to said Odell in payment of the said equitable mortgage, and to divide the residue of said eighth part between the said Elizabeth A. and Lewis J. Manolt ; that the property was sold under the said judgment to Frederick Folz, and the referee duly conveyed the same to him, and that out of the proceeds of such sale the amount due on the mortgage was paid to the said Odell ; that the same had been conveyed to the defendant, Elizabeth L. Petrie, who is now in possession thereof.

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I think defendant is bound by the adjudication that the deed of November 4, 1856, is a mortgage. She claims under that judgment; that judgment adjudged that said deed was a mortgage; under it the mortgagee was paid the amount due on the mortgage.

The court had jurisdiction to make such a judgment. It having so adjudged, all the parties to that action and all claiming under them are bound by it, and cannot set up that a deed or conveyance therein declared inoperative or void as a deed was valid (*Chautauqua County Bank agt. Risley*, 4 Denio, 481; and see same case in court of appeals, 19 N. Y., 377)

Here the deed has been in that action adjudged to be a mortgage, and has been paid. The mortgagee has received the amounts due him or the consideration for which it was given.

The defendant's grantor did not purchase relying on the deed, but on the contrary it expressly appeared in the judgment under which defendant claims that it was not a deed but a mortgage, and that it was to be paid and discharged.

There could be no adverse possession in or against the remainderman until the termination of the life estate (*Christie agt. Gage*, 71 N. Y., 189).

There is no proof that Odell went into possession under the deed at the time it was delivered; and under any circumstances, the deed having been declared a mortgage, and the amount due paid before defendant's grantor acquired his title under the judicial sale, it cannot be used to help the defendant's title. It is not alleged in the answer, nor was it claimed on the trial, that the defendant was subrogated to the right of Odell, the mortgagee, and would then become the mortgagee in possession, and could defend against the owner of the equity of redemption or his representatives any action except one for an accounting of the rents and profits and to redeem; and so it is not necessary to pass on that question.

The plaintiff must therefore have judgment, with costs.

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N. Y. SUPERIOR COURT.

THE KNICKERBOCKER ICE COMPANY agt. THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY and THE NEW YORK, ONTARIO AND WESTERN RAILROAD COMPANY.

New York (city of) — Improvements of the water front — Adjudication as to conflicting claims of grantees under conveyances from the city in relation to lands under water within the city's exterior line along the Hudson river — Easements — Appurtenances — what passes under — Deed of pier with appurtenances — Effect of deed on subsequent purchaser of the adjoining land under water — Trespass — Injunction.

The grantor, owning the lands under water on the side of the pier, an easement therein to a reasonable distance will pass to the grantee.

The first deed being recorded, the latter is subject to the easement thereby created.

Covenants running with the land, is to be performed by a common grantor, when so required, in a required manner.

The performance of the covenants by a grantor of a portion of the land in which there is an easement in favor of a grantee of another portion, may have the effect of destroying the easement.

It will have such effect when the grantor of the common grantor has a legal interest in the performance of the covenant, and requires performance in the prescribed manner.

Municipal corporation, when it is the grantor of the common grantor, and its only interest is that of performing a public duty, the requirements for the performance of the covenants must be in the discharge of its public duty, and in conformity with the covenants or the requirements of an authorized improvement.

Where plaintiff asks an injunction to restrain defendant from trespassing on land, in which the plaintiff has a certain interest, by doing certain things which he has no right to do as between the parties, and which are prejudicial to that interest, his prayer will not be denied, by reason of the fact that he himself is, so to speak, a trespasser, as to the defendant's certain other interests in the same lands, by doing certain things which, as between the parties, he has no right to do, and which are prejudicial to the defendant's interests; but on granting the injunction prayed for he will also be enjoined; and if his trespass be in whole or in part the erection of structures, he will be required to remove them.

Special Term, January, 1883.

Knickerbocker Ice Co. agt. Forty-second St. & Grand St. Ferry R. R. Co.

MOTION for the continuance of an injunction restraining the defendants from filling in the space on the south side of plaintiff's pier at Forty-third street, on the North river, in the city of New York.

Moses B. Maclay, attorney, and *Albert Stickney*, of counsel, for the plaintiff.

Moses Ely and *Alexander & Greene*, attorneys, and *William G. Gulliver*, of counsel, for the defendants.

FREEDMAN, *J.*—Under chapter 182 of Laws 1837, the mayor, aldermen, and commonalty of the city of New York became vested with all the right and title of the people of this state to the lands covered with water along the easterly shore of the North or Hudson river, between Hammond street and One Hundred and Thirty-fifth street, and extending from the westerly side of the lands under water previously granted to the city of New York by the act of February 25, 1826, to the westerly line of Thirteenth avenue.

This includes the premises owned or claimed by all the parties to this action.

By the same chapter, the Thirteenth avenue, as laid out on a certain map, was made the permanent exterior street or avenue in said city along the easterly shore of the North or Hudson river, between Hammond street and One Hundred and Thirty-fifth street, and the several streets south of and including One Hundred and Thirty-fifth street were ordered to be continued and extended westerly along the then existing lines thereof, from their then existing westerly terminations, on a certain map or plan, to the said Thirteenth avenue. The Eleventh avenue was ordered to be continued and extended from its southerly termination at Thirty-third to Nineteenth street; and the Twelfth avenue was ordered to be continued and extended northerly, along its line from Thirty-sixth street to One Hundred and Thirty-fifth street.

On July 1, 1850, the city conveyed to Caleb F. Lindsley,

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by two conveyances, certain water lots or vacant grounds under water, described as being bounded on the north by the center line of Forty-third street; on the south by the center line of Forty-second street; on the east by the line of highwater mark on the eastern shore of the North river, which line was an irregular one; and on the west by the westerly exterior line of Thirteenth avenue, which line was described as "being the permanent exterior line of the said city in said river."

These deeds grant the property described in fee. The following exception, however, was made in each of said grants, viz:

"Saving and reserving from out of the hereby granted premises so much thereof as, per said map annexed, forms part or portions of Twelfth and Thirteenth avenues and" Forty-third street in the one and Forty second street in the other, "for the uses and purposes of public streets, avenues and highways, as hereinafter mentioned."

In these deeds the grantee covenants for himself, his heirs and assigns, when required so to do by the city, "at his own proper costs and charges, to build, erect, make and finish, or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, or that may hereafter be passed or adopted, good and sufficient bulkheads, wharves, streets or avenues, which shall form so much and such parts of Forty-third street, Forty-second street, Twelfth and Thirteenth avenues, as fall within the premises described in the deeds mentioned and reserved, as hereinbefore mentioned from out thereof, and will fill in the same with good and sufficient earth, and regulate and pave the same and lay the sidewalks thereof." The grantee also covenants forever thereafter to keep the streets designated "in good order and repair," and to "obey, fulfill and observe such ordinances, resolutions, orders and directions as the city may from time to time enact, or pass, or make relative thereto." And also covenants that the said streets and avenues "shall forever thereafter continue to be and remain public streets or avenues

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and highways for the free and common use and passage of the inhabitants of said city and all others passing and repassing by, through and along the same and in like manner as the other public streets, avenues, bulkheads and wharves of the said city now are or lawfully ought to be."

In these deeds the city covenants that Lindsley, upon observing his covenants in the deeds, shall be entitled to wharfage accruing "from that part of the said exterior line of the city lying on the westerly side of the hereby granted premises fronting on the Hudson river * * * forever excepting therefrom such wharfage, cranage, advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the southerly half of Forty-third street. * * * "And of the bulkhead in front of one-half of the pier of Forty-second street," both of which were reserved in the city with full power to collect and receive the wharfage for their own proper use and benefit forever.

Each of said deeds further provides as follows:

"And it is hereby further agreed by and between the parties to these presents, and the true intent and meaning hereof is, that this present grant and every word or thing in the same contained, shall not be construed or taken to be a covenant or covenants of warranty or of seizin of the said parties of the first part, or their successors, or to operate further than to pass the estate, right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the legislature of the people of the state of New York."

These deeds were recorded on the 4th and 14th days of August, 1850, respectively.

By a further deed, dated November 11, 1852, the city conveyed to Lindsley the pier now owned and occupied by the plaintiffs. The description reads:

"All the estate, right, title and interest of the said parties of the first part of, in, and to all that certain pier in the city of New York situate at the foot of Forty-third street,

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North river, bounded, described and containing as follows: Beginning at the point formed by the intersection of the northerly side of Forty-third street with the easterly line or side of the Twelfth avenue; running thence southerly, along the easterly side of the twelfth avenue, to the northerly side of said pier; thence westerly, 211 feet three inches; thence southerly, forty feet five inches; thence easterly, 212 feet two inches to the easterly side of the Twelfth avenue; and thence southerly, to a point where the southerly side of Forty-third street intersects with the said Twelfth avenue.

This description by metes and bounds does not include the full width of the street. Nor does the description include the full extent of the street. The pier was not then as wide as Forty-third street. Nor did it have the full extent of Forty-third street. The street was then nominally laid out to the west side of Thirteenth avenue. The deed then continues: "Together with the extent of the present width of the street, with the right of wharfage thereon, together with all and singular the tenements, hereditaments and appurtenances belonging, or in anywise appertaining, and also all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity, of, in or to the above described premises, and every part and parcel thereof, subject to the right of the parties of the first part to order said pier extended into the river at the expense of the party of the second part, whenever and in whatever way they may see fit, reserving to the party of the first part the right to extend said pier at the expense of the corporation of the city of New York, or to grant the right to do so to other parties, if the said party of the second part fail or neglect to extend said pier when ordered so to do, in which case the right to wharfage, &c., at the portion of the pier extended shall belong to the parties at whose expense the extension shall be made."

The deed further provides, as the preceding two deeds had provided, that the true intent and meaning thereof was to pass only the estate, right, title and interest in the land

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described which the city had by virtue of its several charters and the various acts of the legislature, etc.

The property acquired under these three conveyances was conveyed by Lindsley to La Farge.

Both parties to this action, plaintiff and defendants, hold under *mesne* conveyances from La Farge's devisees.

By deed dated March 28, 1860, and recorded May 26, 1860, in liber 811 of Conveyances, p. 447, La Farge's devisees conveyed the pier property to Scholey, Schindler & Conklin. The latter, by deed dated July 25, 1865, and recorded January 17, 1870, in liber 1129 of Conveyances, p. 270, conveyed the same property to the New York Ice Company, and the said company, by deed dated March 7, 1867, and recorded January 17, 1870, in liber 1129 of Conveyances, p. 266, conveyed to the plaintiff in this action.

About September 25, 1873, the plaintiff was ordered by the board of commissioners of docks to extend said pier into the waters of the Hudson river for a distance of about 300 feet, and about November 21, 1873, the plaintiff was further ordered by said board to widen said pier to a width of sixty feet for its entire length as the same then was and as it had been ordered to be extended.

The plaintiff, in this connection, shows that thereupon the said pier was extended and widened as directed, and that the plaintiff has ever since remained in the full and free use and occupation of said pier so extended and widened as aforesaid.

The defendants, on the other hand, show the following additional facts, viz.: The order for the extension of this pier was made only after and upon the filing in the office of the dock commissioners of an agreement in writing by the plaintiff to pay to the city rent for all land under water covered by the said extensions in length and width of the pier. And upon the express condition that whenever any portion of said land under water belonging to the city and covered by the said extensions of the pier should be required by the city for permanent improvement of the water front, no claims whatever

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should be made by the plaintiff, or its successors, for damages or otherwise, for any structures or improvements that may be made upon the land owned by the city.

And upon the further express condition that nothing contained in the permission or order of the dock department for the extension of the pier "shall be considered or construed as a waiver of the title of the city in and to the land lying outside of the dimensions of the present pier owned by The Knickerbocker Ice Company as laid down in the deed from the mayor, aldermen and commonalty of the city of New York to Caleb F. Lindsley, dated November 11, 1852.

By another deed, dated February, 1863, and recorded in liber 867 of Conveyances, page 591, La Farge's devisees conveyed all the property described in the three deeds to Lindsley, except the pier property which they had conveyed to Scholer, Schindler & Conklin, to Charles E. Appleby, who in the next month, March, 1863, conveyed the same to the defendant, the Forty-second Street and Grand Street Ferry Railroad Company.

The complaint then charges that the defendant, the New York, Ontario and Western Railway Company, has contracted with the Forty-second Street and Grand Street Ferry Railroad Company for a lease of the land under water adjoining the said pier upon the south side thereof and to the west of the easterly line of the Twelfth avenue, or has taken, or agreed to take, an assignment or transfer of some interest in said premises, and that claiming to act under authority from the commissioners of the dock department, the New York, Ontario and Western Railroad Company threatens and intends to take possession of the land under water adjoining the pier of the plaintiff, on the south side thereof, and extending from Forty-third street to Forty-second street, and to drive piles thereon, and to fill in the same with solid filling and build thereon; that by the driving of piles or building crib work and filling in, as contemplated by the defendants, the plaintiff will be cut off from its said pier and will be unable to approach

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the same for a large portion of the south side thereof, or to unload its boats or barges, and will be wholly unable to carry on its business at said pier, and that the injury that will be caused to plaintiff by the threatened acts, if executed, will be irremediable, wherefore the plaintiff prays that the defendants be enjoined.

It therefore becomes important and necessary to ascertain accurately the rights of the respective parties to this action under the conveyances mentioned.

The clause in each of the three deeds by the city to Lindsley, that the true intent and meaning of each conveyance is to pass only the estate, right, title or interest of the city by virtue of its several charters and the various acts of the legislature, amounts to no qualification or restriction of the grant, because the city possessed and lawfully possessed all the proprietary interests and privileges covered by the grant, and because the grant as made did not have the effect of restricting or embarrassing the legislative powers and duties of the city as a municipal corporation. In view of the exceptions made, and even by reason of the insertion of the said clause itself, there is nothing in the decisions of the *Presbyterian Church* agt. *The City of New York* (5 Cow., 540); *Brooklyn Park Commissioners* agt. *Armstrong* (45 N. Y., 234); *Whitney* agt. *The Mayor, &c., of New York* (6 Abb. N. C., 329), and other cases falling within the same class, which militates against the grant.

The question then is: What was, as matter of fact, granted? Upon this point the intention of the parties, as appearing from the language used in the deeds, is to govern, but the surrounding circumstances and the relations between the parties may be considered for the purpose of ascertaining what they meant when they spoke. And this rule applies with equal force in the construction of every subsequent deed.

By the two deeds first mentioned the city conveyed the land stretching from the center line of Forty-third street on the north, to the center line of Forty-second street on the

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south, and from the line of highwater mark on the east which which was an irregular line between Eleventh and Twelfth avenues, to the westerly or exterior line of Thirteenth avenue, saving and reserving therefrom so much thereof as forms part or portions of the Twelfth and Thirteenth avenues, and of Forty-second and Forty-third streets. The parts or portions thus saved and reserved, constituted, as held by the general term of the supreme court, in *Langdon agt. The Mayor, &c.*, exceptions and not mere reservations, which left the fee to them in the city for the uses and purposes of public streets, avenues and highways. Aside from these exceptions, the land conveyed was conveyed in fee. Certain covenants were entered into by the grantee which will be hereinafter considered, but the grant was not diminished thereby. At this time the exterior line of the city on the North river, in that vicinity, had been fixed as co-incident with the westerly line of the Thirteenth avenue, which last mentioned line was 646 feet and two inches west from the easterly line of the Twelfth avenue, and about 430 feet west of the westerly end of the pier thereafter conveyed.

At the time of the execution by the city of the third deed to Lindsley by which the so-called pier property was conveyed, the pier then in existence was forty feet and five inches wide and extended about 211 feet from the east side of the Twelfth avenue. It was situated within the boundaries of Forty-third street in such a way that between the southerly side of the pier and the southerly line of the street there remained a strip of about four feet in width. This strip, as well as so much of the whole pier as was south of the center line of Forty-third street, had been expressly excepted from the two conveyances first mentioned. In conveying the pier property by the description contained in the third deed, the city conveyed not only the pier itself, but also the land covered by the dimensions of the pier in fee, and the words "together with the extent of the present width of the street," carried the fee for the length of the pier to the southerly side of Forty-third

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street as then laid out on a certain map ; for the words used clearly meant the width of the street as thus laid out. To the south of this southerly line of Forty-third street, the city could grant no right of way or easement for the reason that the fee of the land south of that line had already been conveyed without the reservation of a right of way or easement over the water (*Outerbridge* agt. *P'helps*, 45 *N. Y. Superior Ct. R.*, 555).

But the position of affairs changed when a union of all the lands and interests and the appurtenances was effected in Lindsley, who was also the owner of the uplands to the east of the highwater mark. It then became competent for him to convey the pier property with appurtenances that did not previously belong to it, but were necessary to the use of the pier, as a pier, in case of its severance from the other property. He, it is true, did not do so. He conveyed the whole to La Farge. But this placed La Farge in the same position. When, therefore, the devisees of La Farge made severance and conveyed the pier property while they retained the remainder, and in doing so conveyed the pier, by the description contained in the deed from the city to Lindsley, together with the extent of the width of the street, and also together with all and singular the appurtenances, &c., &c., and all the estate, right, title, interest, property, claim and demand which in La Farge, at the time of his decease, of, in and to the same, and every part and parcel thereof, and added covenants, in the ordinary form, for the quiet enjoyment and warranty, not only of the pier property specifically described, but also of the appurtenances, the grant carried with it all that La Farge had owned which was necessary to the use of the pier as a pier (*Lampman* agt. *Milks*, 21 *N. Y.*, 505 ; *Doyle* agt. *Lord*, 64 *N. Y.*, 432 ; *Simmons* agt. *Cloonan*, 81 *N. Y.*, 557).

The rule of construction applicable to the deed by the devisees of La Farge to Scholey, Schindler & Conklin, under which the plaintiff claims, being as stated, and there being a strip of only four feet of water between the southerly side of

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the pier and the southerly line of the street, it was almost absolutely necessary to the enjoyment of the pier as such by the grantees that the land under water remaining in the grantors and adjacent to the southerly line of Forty-third street should remain free and unobstructed, as in times past, for a distance which with the strip of four feet in width would constitute a reasonable distance from the southerly side of the pier, and especially was it necessary because the right to wharfage on the westerly end of Forty-third street where said street adjoins the exterior line of the city, had been expressly reserved to the city by the deeds of 1850. This being so, the right to use the water for such a reasonable distance constituted an easement in favor of the pier property conveyed which passed with the land, and a servitude upon the property retained.

From these matters and the fact that the deed to Scholey, Schindler & Conklin was duly recorded, it follows that when by subsequent conveyances the Forty-second Street and Grand Street Ferry Railroad Company acquired the title to all the remaining property, such property was and continued subject to the servitude named.

The next question, then, is as to how long this servitude is to continue. Upon this point the covenants of Lindsley in the deeds accepted from the city become important, because they did and do run with the land. In the two deeds first accepted he covenanted for himself, his heirs and assigns, that whenever he should be required by the city so to do, he would build sufficient bulkheads and wharves and fill in so much and such parts of Forty-second and Forty-third streets and Twelfth and Thirteenth avenues as fell within the premises described and accepted, and to regulate and pave the same and lay the sidewalks thereof, and that the said streets and avenues should forever thereafter continue to be and remain public streets or avenues and highways for the free and common use and passage of the inhabitants of said city, and all others, &c., &c.

The conveyance of the pier property by the third deed

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accepted by him was made in express terms, subject to the right of the city to order the said pier to be extended, and although, as already stated, it conveyed with the pier the land covered by the pier in fee, it conveyed especially as the interest of the city only was conveyed, only such a fee as the city possessed, namely, a fee subject to whatever easements existed in favor of the public. What these easements were, or whether, in fact, there were any, it is not necessary to determine here. These questions may hereafter become of importance as between the plaintiff and the city.

It sufficiently appears, however, that both the plaintiff and all its grantors took the pier in question with notice that Forty-third street was to be extended to the exterior line of the city, namely, the westerly side of Thirteenth avenue; that Twelfth and Thirteenth avenues were to be built between Forty-second and Forty-third streets; that all the then existing water between Forty-second and Forty-third streets, and west of the easterly line of Twelfth avenue, was to be filled in and all access to the southerly and westerly sides of said pier cut off, whenever the city saw fit so to direct; and that in consequence thereof the character of the pier, as a pier, would be completely destroyed. As matter of legal effect, the title to the streets and avenues thus to be made was to remain in the city for the uses and purposes stated. In the meantime, the plaintiff and all its grantors took the pier, subject to the right of the city to order the same to be extended, &c. So far, the city saw fit to require only the extension of the plaintiff's pier for a length of about 300 feet, and its widening to a width of sixty feet. This was done, and it was done in such a way that, under the deeds of 1850 and the agreement filed by the plaintiff with the department of docks concerning the said extension and widening, the title to the land covered by the extension — or the new pier, as it may be called — remained in the city; and the plaintiff further agreed that whenever any portion of the land under water belonging to the city and covered by the said extension should be required by the city

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for the permanent improvement of the water front, no claim whatever should be made by the plaintiffs or its successors for damages or otherwise, for any structures or improvements that might be made upon the land owned by the city.

The rights of the plaintiff, so far as they appear material to this motion, may therefore be summed up as follows, viz. : The plaintiff owns the old pier, and whatever fee the city had to the land upon which it stands and to the strip of four feet between the southerly side of said pier and the southerly line of Forty-third street, as laid out on the map, with a right of way over the water to the south of the last mentioned line for a reasonable distance ; and it also has a lease of the land under water on which the new pier stands. These rights are subject, however,

1. To Lindley's covenants in the deeds of 1850 to build, uphold and keep in good repair the south half of Forty-third street and the whole of Twelfth and Thirteenth avenues (so far as described in the deeds) as public streets or avenues and highways forever hereafter ;

2. To the city's right to convert the new pier into a public street ;

3. To the city's right of wharfage accruing from the westerly end of the southerly half of Forty-third street ; and

4. To the right of the defendant, the Forty-second Street and Grand Street Ferry Railroad Company, as grantees of Lindsley to all wharfage accruing from the bulkhead, extending when constructed pursuant to requirement by the city, along the exterior line of the block from the southerly line of Forty-third street to the northerly line of Forty-second street, and necessarily cutting off all access by water to the southerly side of plaintiff's pier. Of course the filling in of Twelfth and Thirteenth avenues, under the direction of the city, implies the right to fill in the intermediate space.

But until the city gives such a direction or makes such a requirement, the plaintiff has the right to the continued use of the old and the new pier, and the land of the Forty-second

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Street and Grand Street Ferry Railroad Company remains subject to the servitude above mentioned. To be effective, such direction or requirement, when given or made, must be given or made in conformity with the terms of the deeds of 1850 (*The Mayor, &c. agt. Smith*, 64 *How.*, 89; *opinion by VAN VORST, J.*).

The next inquiry, therefore, must be, whether the improvements proposed to be made by the New York, Ontario and Western Railway Company as the lessee of the Forty-second Street and Grand Street Ferry Railroad Company are of a character contemplated by the covenants, and whether they are about to be made in pursuance of a requirement by the city.

The motion papers present some conflict as to the extent of the intended improvement, but the defendants assert positively that the westerly line of said improvements will not extend beyond the westerly line of the old pier as it existed prior to its extension, and I shall assume the truth of the assertion concerning the character of the improvements, the filling in which they involve along the southerly side of Forty-third street would be clearly within the power of the defendants, in case the Thirteenth avenue were in process of construction or had been required to be built, because in such a case it must have been contemplated by the covenantor. If, therefore, the New York, Ontario and Western Railway Company can rightfully proceed with the filling in, it clearly may make the other improvements contemplated by it.

But I cannot find that the proposed filling in is to be done pursuant to any requirements from the city. Nor is it to be done as part of the general plan adopted by the department of docks and the commissioners of the sinking fund for the improvement of the water front. The New York, Ontario and Western Railway Company, as a private party and for its own purposes, desires to build a ferry landing, and to do so it is found that the land under water almost immediately adjoining plaintiff's old pier should be filled in. Application

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is made to the department of docks for permission to do so in advance of the carrying out of the general plan for the improvement of the water front, and the permission is given. This clearly shows that even if it be assumed that the department of docks is capable of fully representing, and does fully represent, the city for the purposes under consideration, the proposed filling in was neither required by the city to be done pursuant to the covenants of 1850, nor does it constitute part of the authorized plan for the improvement of the water front. The permission given cannot therefore have the effect of authorizing the defendants to deprive the plaintiff of any right which it possesses in the premises until the city sees fit to act. True, as between the city and the defendants, the permission may partake of the nature of a requirement, for the defendants may, so far as they themselves are concerned, waive their rights. But as against the plaintiff the action of the city must rest in the discharge of a public duty, and must be in conformity with the covenants of 1850 or the requirements of the authorized improvement of the water front.

It has been insisted, however, that even if the plaintiff ever could claim the easement contented for, the same was abandoned because neither the southerly side of the old pier nor the water on the south side of that pier has been used for the purposes claimed by the plaintiff since the extension of the pier. Upon this point there is a conflict of evidence. The preponderance, in my judgment, shows a continued limited use, owing to insufficient depth of water at certain times, but not an abandonment. Upon the whole the plaintiff has shown enough to call for the continuance of the injunction, if otherwise entitled thereto, to protect whatever use can be made of the pier as such.

Another point strongly urged in opposition to the motion is that the plaintiff is now a trespasser upon the land of the defendant along the entire southerly line of the new pier by reason of the construction upon piles driven for that purpose

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and the maintenance and use of a so-called ice platform along said southerly line, and that by reason thereof the plaintiff does not come into a court of equity with clean hands. The trespass seems to have been clearly established. But under the decision of the court of appeals in *Comstock v. Johnson* (46 N. Y., 615) this only constitutes matter to be considered in the framing of the relief to be granted.

Other matters have been alluded to, but they do not, after what has already been said, call for special notice. The object of the action being to secure a determination of the rights of the parties to it, as between themselves, neither the city nor the department of docks is a necessary party to this action, nor is it necessary to determine what action the department of docks may take in the exercise of the statutory powers conferred upon it.

My conclusion is that the injunction heretofore granted should be continued against the defendants during the pendency of the action, but in a modified form. In the first place, it should be made conditioned upon the removal, within a reasonable time, by the plaintiff, of all encroachments upon the land of the defendants along the southerly line of the new pier, and, in the second place, it should, in terms, provide for its expiration before the termination of the action, in case the defendants should be required by the city, under the covenants of 1850, to do any work, the doing of which would necessarily interfere with or destroy the easement of the plaintiff.

Order to be settled on notice.

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SUPREME COURT.

EDWARD H. McDONALD, appellant, agt. MARY E. WOODBURY,
as executrix of HENRY WOODBURY, deceased, respondent.

Practice — Examination before trial — Death of defendant — Evidence — The testimony of a party taken at the instance of his adversary is admissible in his own behalf after the death of the latter — Code of Civil Procedure, sections 870, 829 — Stipulation made between parties not vitiated by the death of defendant.

Where parties to an action have been examined before trial, each at the instance of the opposite party, under section 870 of the Code of Civil Procedure, for the purpose of assisting such opposite party to prepare for trial, and such examinations are reduced to writing and signed by the respective parties, and the defendant subsequently dies and his representative is substituted in the case, whereby the plaintiff becomes incompetent under section 829 of the Code of Civil Procedure to give testimony concerning personal transactions had with the deceased:

Held, 1st. That the plaintiff could then prove such personal transactions by reading his previous deposition to the jury, although such deposition was taken by the defendant's counsel for their own benefit and not for benefit of plaintiff.

2d. That it was error to dismiss the plaintiff's complaint for lack of proof which was contained in such deposition.

3d. That a stipulation in the action made between the parties during the lifetime of defendant was not violated by his decease.

First Department, General Term, June, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from judgment dismissing complaint.

Edward C. Graves, for appellant.

Reuben H. Underhill, for respondent.

BRADY, J. — It appears that this action was originally against Henry Woodbury, who died during its pendency. It also appears that after issue was joined the depositions of plaintiff and of Mr. Woodbury were both taken under a stipulation

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between the respective attorneys. The examination of the plaintiff was conducted in the nature of a cross-examination by Mr. Underhill, the defendant's counsel, the defendant being personally present. A similar examination of the defendant was also taken and was signed, acknowledged and sworn to before a justice of this court. The defendant died and his executrix was substituted as defendant.

Upon the trial the plaintiff, being disqualified from testifying concerning his personal dealings with the deceased, offered in evidence his deposition, which was taken as already mentioned, which was excluded by the court. He then offered the deposition of the defendant, although it was against his interest, which was received and read to the jury, after which the plaintiff's deposition was again offered and excluded. The complaint was then dismissed upon the ground that the plaintiff has not offered to carry out the contract on which his claim rests, and which seems to have been an essential prerequisite, and as to which there was testimony contained in his deposition. The question presented on this appeal, therefore, and indeed the only question presented, is whether the plaintiff's deposition should have been admitted and read to the jury under the circumstances. The precise question has been decided by the general term of the second department in favor of the plaintiff in the case of *Rice agt. Motley* (24 Hun, 143). Although, perhaps, there may be some room to doubt the accuracy of this decision, yet, nevertheless, we think the reasoning by which it is sustained is such as to justify us in concurring.

The examination of the plaintiff, as we have seen, took place in the presence of the defendant, and the cross-examination was conducted also in his presence, and the defendant had an opportunity to respond upon his examination to all the statements made by the plaintiff either upon direct or cross-examination, which it must be supposed he did, and thus the respective parties perpetuated their statements in writing and in a formal way. In addition to the provisions of the Code

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relating to the subject we have in this case an express stipulation that these depositions, either or both, might be read upon the trial, and substantial justice would seem to require that the stipulations should be enforced, inasmuch as the plaintiff by the death of the defendant is prevented from giving evidence which is essential to the maintenance of his action, and as to which the deposition is sufficient, and as to which the defendant's evidence is also before this court.

The judgment should, therefore, be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and DANIELS, J., concur.

SUPREME COURT.

CAROLINE C. PIPER agt. JOHN L. HOARD.

Statute of limitations—Action to set aside a deed for fraud—Period of limitation—Long continued undue influence does not affect the operation of the statute.

Under section 91 of the Code of Procedure a party has six years in which to bring his suit in equity to set aside a deed on the ground of fraud, dating the time of limitation from the discovery of the fraud.

Accordingly where the deed from F. P. to the defendant was dated March 26, 1859, and was recorded September 20, 1859; and in January, 1860, a suit was commenced in the name of F. P. to set aside said conveyance as fraudulent and obtained by undue influence, and shortly thereafter the defendant, through undue influence and fraud, compelled F. P. to discontinue said suit, and an instrument was executed providing for an arrangement and settlement of all differences and difficulties, the same being dated October 11, 1860. The plaintiff was born on the 6th of February, 1860; F. P. died on the 9th of March, 1860; the plaintiff became twenty-one years of age on the 6th of February, 1881. In an action commenced on the 19th of February, 1881, by the plaintiff, who is a daughter of F. P., to have the deed from him to defendant declared fraudulent and void:

Held, 1st. That the relief demanded is purely equitable in its nature, for a court of equity alone has power to entertain actions to set aside or annul conveyances and agreements on the ground of fraud.

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- 2d.** There was a period of sixteen years, during any part of which F. P. could have commenced an action for the same relief in substance that the plaintiff demands in her complaint.
- 3d.** Whatever right the plaintiff has to maintain this action came to her by inheritance from her father. She took such right of action in the precise condition that it was when her father died. The statute having run as to him when he died, it has run as to her.
- 4th.** The rule as to disabilities is that when the statute begins to run, it is not arrested by any subsequent disability, unless expressly as provided in the statute, and a person who claims the benefit of the general exceptions in the statute can only avail himself of such disabilities as existed when the right of action first accrued, so that when the statute has begun to run against the ancestor it is not suspended by any statutory disability in the heir at the time of the descent cast. Therefore, the time that elapsed from the date of F. P.'s death to the date when this action was commenced should be added to the period that the statute had run before his death, making more than twenty years. Hence, even if this were an action for the recovery of real property, it would fall within the statute.
- 5th.** No such disability as long continued undue influence is provided for by the statute. Until the undue influence ripens into a cause of action, the statute does not begin to run, but when it has so ripened and the right of action is complete, the continued exercise of the same influence over the person defrauded, in order to prevent him from suing, does not affect the operation of the statute.

Herkimer Special Term, September, 1882.

THE plaintiff, in her complaint in this action, alleges that one Andrew Piper, of Herkimer county, died in 1842, and left by his will all of his property to his two sons, James and Frederick, subject to certain charges, and also subject to the following limitation, viz.: "That in case of the death of my son Frederick Piper, without lawful issue, the part and portion of my estate, real and personal, hereinbefore devised and bequeathed to him shall belong to, and is hereby devised over to, my said son James Piper and his heirs, subject to all the charges and conditions hereinbefore contained;" that James and Frederick took possession of said property, consisting mainly of a farm of 144 acres in the town of Frankfort in said county, and continued to own the same until the 26th of March,

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1859, when Frederick conveyed his interest in the farm to the defendant, who had in the meantime married a daughter of James, for a consideration, as expressed in the deed, of \$500; that Frederick was a man of weak and feeble mind, incapable of managing the property in question or of transacting or understanding ordinary business matters; that at the date of said deed, and for a number of years prior thereto, the defendant had been his general agent, had managed his part of the farm, transacted all of his business, lived in the same house with him, and had acquired complete control over him; that said deed was procured from Frederick by the defendant for an inadequate consideration, through undue influence and fraud; that the pretended consideration therefor was an agreement by the defendant to pay, on the death of Frederick, to the woman whom he should marry, the sum of \$500, and to support him, wholly or in part, during his life; that it was a part of the defendant's plan to cause Frederick, who was then unmarried, to marry, and with this object in view, he induced one Catherine Hagel to go to Frankfort and see Frederick, representing to her that he had a fine property worth \$8,000, so left that if he married and had an heir, the heir would have the property; that upon this visit of Catherine, the defendant introduced her to Frederick, whose hair, which had been gray, was dyed black for the occasion, and by representing that Frederick was between forty-five and fifty years old and owned property as aforesaid, induced her to marry him, and they were accordingly married on the 11th of April, 1859, the first day they ever met; that they lived together for more than a year, and on the 6th of February, 1860, the plaintiff, their child, was born; that during the latter part of 1859 the plaintiff's mother, having discovered that the defendant claimed to own the farm, which had in the meantime been formally partitioned between James and the defendant by mutual quit-claim deeds, went with Frederick to Utica, where they employed the law firm of Conkling & Throop to bring an action in the name of Frederick against the defendant and

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James Piper to set aside said conveyance as fraudulent and obtained by undue influence; that early in January, 1860, said suit was commenced, and shortly thereafter the defendant, through undue influence and fraud, induced and compelled Frederick to discontinue said suit, without the knowledge or consent of his wife; that Frederick and his wife were provided for by the defendant, and lived together in an old house on the farm, fitted up for the purpose, until June, 1860, when he went to the house of the defendant to live, and after that no provision was made for the plaintiff or her mother, except by the pocrmaster; that on the 11th of Octobor, 1860, a written instrument was executed by Frederick, his wife, the defendant and Harris Lewis and John W. Davidson, which, after reciting the conveyance by Frederick to the defendant, said marriage, the birth of the plaintiff, the dissatisfaction of her mother with the present situation and with said conveyance, and the desire to separate from her husband, the obligation of the defendant to support plaintiff and her mother during Frederick's life, the mutual desire of all to make an arrangement and settlement of all their differences and difficulties, provided that defendant should pay \$900 for the benefit of plaintiff and her mother in full discharge of all his liabilities to Frederick and his wife and child; that a bond from defendant to Frederick, dated March 21, 1859, should be canceled and all liability thereupon discharged; that Lewis and Davidson should take the \$900, pay \$400 thereof to the wife for her sole use, and invest the remainder in bond and mortgage, and pay the interest to her until the child should become twenty-one, when the principal was to be paid to the child, the plaintiff, but if mother or child should die before that date, the whole was at once to belong to the survivor; the mother was to support herself and child and hold Frederick and defendant harmless from any claim for the support of either; the defendant was released from all liability to the mother, and Davidson and Lewis joined simply as trustees for her and her child, the instrument was under seal, was signed

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by a subscribing witness, and was declared to be binding upon the administrators and executors of all the parties thereto.

The complaint further alleges that said writing was executed by Frederick under said influence and compulsion of defendant in ignorance of its contents and effect; that the wife executed it because of her poverty and the desertion of her husband under defendant's influence; that no one was authorized to execute on behalf of plaintiff, who in her complaint repudiates the same and claims that it was a part of the defendant's fraudulent scheme and device to cheat and defraud her father and herself out of said property, but consents that whatever had been received for her use might be deducted from the profits realized by defendant from the property; that at the time of the conveyance by Frederick the farm was worth \$4,000 or \$5,000, and is now worth \$12,000; that Frederick died on the 9th of March, 1876, leaving the plaintiff his only child and heir.

The relief demanded, among other things, is that said deed from Frederick to defendant be declared fraudulent and void; that plaintiff be adjudged entitled to the possession and ownership of her father's part of said premises, and that the defendant account for the rents and profits, and pay them, less his lawful charges, to the plaintiff.

The original answer admitted certain facts, but denied all allegations of fraud, undue influence, mental incapacity and the like. After issue was thus joined an order was made at special term directing that two questions of fact arising under the pleadings be tried before a jury, and in answer to those questions the jury found that the defendant obtained said deed from Frederick by fraud and undue influence, and that the defendant also procured the execution of the agreement for a settlement, dated October 11, 1860, by fraud and undue influence. After this verdict was rendered an order was granted at special term allowing the defendant to amend his answer, and he then pleaded, in addition to his former defense, the statute of limitations. Subsequently a motion for a new

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trial was made and denied, and on the 8th of September, 1862, the cause was submitted for final decision upon the pleadings, verdict and the evidence taken upon the trial before the jury.

A. M. Beardsley, for plaintiff.

Amos H. Prescott and *George W. Smith*, for defendant.

VANN, J. — The findings of the jury are adopted as the findings of the court. The only question that now remains to be considered is whether the statute of limitations is a defense to the action.

It is alleged in the amended answer that the cause of action set forth in the complaint did not accrue within the period of six years before the commencement of the action; and, also, by a separate answer, that said cause of action did not accrue within the period of ten years before the action was commenced.

The deed from Frederick Piper to the defendant was dated March 26, 1859, and was recorded September 20, 1859. The plaintiff was born on the 6th of February, 1860. The instrument providing for an arrangement and settlement of all differences and difficulties bears the date of October 11, 1860. Frederick died on the 9th of March, 1876. The plaintiff became twenty-one years of age on the 6th of February, 1881. This action was commenced on the 19th of February, 1881.

There was a period of sixteen years, therefore, during any part of which Frederick could have commenced an action for the same relief in substance that the plaintiff demands in her complaint.

That relief is purely equitable in its nature, for a court of equity alone has power to entertain actions to set aside or annul conveyances and agreements on the ground of fraud. Whatever right the plaintiff has to maintain this action came to her by inheritance from her father. She took such right of action in the precise condition that it was in when her father died. His death did not create the cause of action, nor

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add to it, nor affect it, except that the right to commence suit upon it descended from him to her. Therefore, if the statute had run as to him, when he died, it has run as to her; or, in other words, she inherited a cause of action that had outlawed. The effect of success in an action brought by the father in his lifetime would have been to reinvest him with the title to the farm, as of the date when he parted with it. The effect of success by the plaintiff in this action would be to reinvest her father with the same title as of the same date, and hence enable her to inherit the land from him, as his sole heir at law. It is upon this ground that the right of action descended to her, instead of going to her father's administrator. But she has no other or better right of action, so far at least as the theory and compass of her complaint is concerned, than her father would have had on the day that he died. The statute of limitations then in force was a part of the Code of Procedure, and the section applicable to such an action as this, had it been commenced by her father, was obviously either number ninety-one or number ninety-six.

Section 91, after fixing the period of limitation for many classes of actions at six years, enacts the same limitation for "an action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery" and adds these words: "The cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. This section clearly embraces and specifically defines the cause of action that Frederick Piper had (*Fort agt. Farrington*, 41 *N. Y.*, 164; *Mayer agt. Griswold*, 3 *Sand. Supr. Ct.*, 464). But if it does not, then it must be covered by section 97, which provides that "an action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued." According to the Code of Procedure there was no action that did not have its period of limitation (*Sec. 74, Code of Procedure*). Section 97 prescribed the longest period of all, except in the case of actions

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for the recovery of real property and upon judgments and sealed instruments. But whether the period that applied to the cause of action that accrued to Frederick in his lifetime was six or ten years, is not important, as sixteen years elapsed after he had the right to sue, before he died.

Moreover, the rule as to disabilities is that when the statute begins to run it is not arrested by any subsequent disability, unless expressly as provided in the statute, and a person who claims the benefit of the general exceptions in the statute can only avail himself of such disabilities as existed when the right of action first accrued (*Code of Civil Pro.*, sec. 106; *Wood on Limitation of Actions*, 10), so that when the statute has begun to run against the ancestor it is not suspended by any statutory disability in the heir at the time of the descent cast (*Rogers agt. Brown*, 61 *Mo.*, 187; *Swearingen agt. Robertson*, 39 *Wis.*, 462). Therefore the time that elapsed from the date of Frederick Piper's death to the date when this action was commenced should be added to the period that the statute had run before his death, making more than twenty years. Hence, even if this were an action for the recovery of real property it would fall within the statute (*Code*, sec. 78; *Miner agt. Beckman*, 50 *N. Y.*, 337).

The learned counsel for the plaintiff, in the exhaustive brief that he submitted, seeks to avoid the effect of the statute by contending: 1st. That Frederick never actually discovered the facts constituting the fraud practiced upon him by the defendant; and, 2d. That as he continued in the same situation and under the same undue influence as long as he lived, he was under a disability that is presumed to have prevented him from making discovery of the fraud.

As to the first position the evidence does not sustain it. The facts shown by the plaintiff compel the inference that Frederick in fact knew of the fraud as early as 1860.

The second position, even assuming that the facts upon which it is based existed, does not help the plaintiff. While, as already appears, the Code of Procedure fixed a period of

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limitation for every action, it also provided that if the person entitled to sue at the time the cause of action accrued was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life, the time of such disability should not be a part of the time limited for the commencement of the action (*Sec. 101*).

Provision is also made for the case of aliens, and where judgment has been reversed on appeal, and where the commencement of an action has been stayed by injunction, appropriate to the several subjects (*Secs. 103, 104 and 105*).

But no such disability as long continued undue influence was provided for by the statute, yet as certain disabilities are specified it is presumed that no others can exist, or at least that the legislature intended to prevent all others from delaying the statute. Until the undue influence ripens into a cause of action the statute does not begin to run; but when it has so ripened and the right of action is complete, the continued exercise of the same influence over the person defrauded, in order to prevent him from suing, does not affect the operation of the statute. Whether the legislature presumed that such influence could not be prolonged to a period of six years, or concluded that it was better to secure the public at large from prosecution after a certain period than to permit infrequent cases of fraud to be redressed after a longer period, it placed a limit to the time within which an action founded on undue influence could be commenced, and did not include the continuance of that influence in its list of disabilities. Some states make unsoundness of mind a disability (*General Statutes of Kentucky for 1881, chap. 71, art. 4, sec. 2; Revised Code of Mississippi, 1880, chap. 76, sec. 2677*). But the statute of this state, by including insane persons only, excluded even idiots and imbeciles who would seem to require as much protection as if insane (*Sanford agt. Sanford, 62 N. Y., 553*).

Courts have no power to make exceptions in order to protect a party in a case of great hardship from the consequences

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of the statute, unless they come clearly within the saving clauses therein contained, and the exercise of any such authority by a court is a usurpation of legislative powers. They cannot add any exceptions to those mentioned in the statute, however much the ends of justice in a particular case may demand it (*Banning on Limitations*, 85 ; *Wood on Limitations*, 496).

The counsel for the plaintiff, in his able argument, also contends that the representations of the defendant to Mrs. Piper that the farm belonged to Frederick, and was so left that it would go to his child if he had one, induced her to marry Frederick, and thus gave to the plaintiff, the fruit of that marriage, a cause of action in her own right. To such an action the plea of the statute would be no answer, as the plaintiff was under the disability of infancy until a few days before this suit was begun.

There are many cases in the English reports relating to feigned conveyances and false representations made by third persons in order to bring about marriages. The principle upon which the courts proceed in such cases is, that as the wife must be presumed to agree to the marriage as well in expectation of the present support which she and her children will receive from her husband, as of the provision which he may have made for them after his death ; that a person who has been at all concerned in raising such expectation shall not be suffered in anywise to disappoint it (*Atherly on Marriage Settlements*, 485).

Upon this principle it was held that where a man, in order to help his brother's marriage, gave him a security for £1,730, which he pretended he owed to him, but took a bond of indemnity from his brother ; and the security was shown to the parents of the intended wife and was an inducement to the marriage, the giver of the feigned security was bound to pay it (*Montefiore agt. Montefiore*, Wm. Blackstone, 363).

So where a person, in order to promote the marriage of one who was in debt agreed to take the debt upon himself and

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gave the creditor a security for it, but privately took a counter security from the original debtor, it was held that the person taking the debt upon himself was bound to pay it, and the counter security was set aside (*Redman* agt. *Redman*, 1 *Vern.*, 348).

And where the creditor of a man about to marry represented to the wife's friends that he had no demand upon the intended husband, it was held by lord THURLOW, on a bill filed by the husband and his trustees, that the creditor should be restrained from recovering any part of such debt (*Neville* agt. *Wilkinson*, 1 *Brown's Ch. Cases*, 543).

Also where a son who owed his mother, being about to marry, represented himself as free from debt, and she, on being spoken to about it by the father of the intended wife, made no disclosure of the debt, it was held in an action brought in the court of exchequer by the mother against her son to recover such debt, that the son was no longer liable (*Scott* agt. *Scott*, 1 *Cox*, 378).

These and other cases are cited on behalf of the plaintiff to relieve her from the effects of the statute, but this action was brought for relief from the fraud practiced by the defendant upon her father, not upon her mother. The deed which she wishes to have set aside, was given before her father ever saw or heard of her mother. The representations made to her mother were wholly independent of the giving of the deed. Hence any cause of action founded on those representations are likewise independent of the giving of the deed. If the deed had been given for a full consideration, unaffected by any question of fraud, undue influence or mental incapacity, still the liability of the defendant for any false representations that he made to the mother to induce her marriage would be the same. Such an action would belong to the plaintiff in her own right and not by inheritance from her father. Its foundations would be the representations made to her mother, not the original fraud practiced on her father. The action set forth in the complaint is not such an action.

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It was neither brought nor tried upon that theory. In the pleadings and on the trial the marriage was treated by both parties only as evidence bearing upon the motives of the defendant and his fraud in procuring the deed. While the marriage formed no part of the right of action that the plaintiff inherited from her father, it is an essential part of any cause of action that she can maintain to compel the defendant to make good his representations to her mother, or to restrain him from asserting title to the farm, which she would have inherited had his representations been true. I am, therefore, compelled, and I admit my reluctance, to hold that the statute of limitations is a defense to this action.

The complaint of the plaintiff should be dismissed, but without costs and without affecting the terms upon which the right to amend his answer was granted to the defendant.

Findings may be prepared accordingly and served, with a copy of this opinion, upon the attorneys for the plaintiff, who are at liberty to propose amendments, before they are submitted for my signature.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THE GLOBE
MUTUAL LIFE INSURANCE COMPANY.

*Insurance (life) — When policy does not lapse for non-payment of premiums —
Necessary steps to forfeit policy — When policy not surrendered — Notary
appointed for one county cannot perform duties in another — When costs not
allowed against receiver.*

On February 28, 1866, upon the application of B. to F., the general agent of the Globe Mutual Life Insurance Company at Poughkeepsie, such insurance company issued its policy of insurance No. 1,877, whereby, in consideration of the sum of \$328.60 then paid, and the payment of a like sum on or before February twenty-eighth, in each and every year thereafter, it insured the life of said B. for the benefit of his wife and surviving children. On March 1, 1871, on application of B., policy

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No. 1,877 was exchanged for registered policy No. 1,891, containing the same conditions. On February 28, 1879, F., the general agent of the company, according to his custom charged B. with the annual premium, crediting the company with the payment to himself of such premium. On March 21, 1879, F. died, and after his death B. called at the office of the company in New York and was told that the policy had lapsed by reason of the non-payment of the premium of February 28, 1879, but that if he would assent to a re-examination they would give him a paid-up policy for four years. B. signed in his own name and that of his wife a written surrender of the policy. On the next day the company sent a messenger to Poughkeepsie with a paid-up policy and took from B. and wife a surrender of the policy, they signing the same for themselves and as guardian of W. F. B., their infant child. The signature to such surrender and acknowledgment of execution were made in the city of Poughkeepsie to one C. B., a notary public appointed for and residing in the city and county of New York. The claim founded upon policy 1,891 has been duly presented to the receiver within the time limited for that purpose:

Held, 1st. That the policy did not lapse by reason of the non-payment of the premium due February 28, 1879. As between the insured and the company it was paid on the day it was due. The company had a credit for the amount thereof on the books of their agent.

2d. No step has been taken to forfeit the policy as required by chapter 321 of the Laws of 1877; and without giving the notice as required by said act there could be no forfeiture.

3d. The attempted surrender by B. was ineffectual. The insurance was for the benefit of his wife and children, and he had no authority in fact, and of such fact the company was informed, to execute the surrender for his wife.

4th. The surrender by the wife was ineffectual as the statute (3 R. S. [1st ed.], 162, sec. 911) requires it to be acknowledged in the same manner as a release of dower. The notary who took the acknowledgment was an officer appointed for and residing in New York and could not execute its duties in Poughkeepsie.

The resistance to this claim by the receiver being upon reasonable grounds and in good faith no costs should be allowed against him.

Ulster Special Term, June, 1882.

MOTION to confirm referee's report upon policy No. 1,891.

F. L. Westbrook, for motion.

Mr. Devenny, for the receiver.

Deputy Attorney-General Keeler, opposed.

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WESTBROOK, *J.* — By the report of the referee the following facts are established: On February 28, 1866, upon the application of Oliver H. Booth to Henry H. Frost, the general agent of the Globe Mutual Life Insurance Company at Poughkeepsie, New York, such insurance company issued its policy of insurance No 1,377, whereby in consideration of the sum of \$328.60 then paid, and the payment of a like sum on or before February twenty-eight in each and every year thereafter during the continuance of such policy, it "insured the life of said Oliver H. Booth for the benefit of his wife and surviving children."

It was the custom of the general agent, Mr. Frost, on the twenty-eighth of February in each year, to charge Mr. Booth with the annual premium upon his books, giving the company as against himself credit for the premium, and call upon Booth for the money, when he needed the same, who then made prompt payment.

On March 1, 1871, on the application of Mr. Booth, policy No. 1,377 was exchanged for registered policy No. 1,891, which was for the same amount requiring the same annual premium, and was also for the benefit of the wife and children of the said Booth.

On February 28, 1879, Mr. Frost, the general agent of the company, according to his custom, charged Mr. Booth with the annual premium due upon the policy 1,891, crediting the company with the payment to himself of such premium.

On March 21, 1879, Mr. Frost died, and after his death Mr. Booth went to the office occupied by said Frost in his lifetime, and tendered to the persons therein, who had been in Frost's employ, the amount of the premium due February 28, 1879. Such persons declined to receive the money, upon the ground that they were not the agents of the company.

No notice has been served by the company, as provided by chapter 377 of the Laws of 1877, requiring the payment of the premium under penalty of the forfeiture of the policy.

Wieland agt. Renner.

CARL HAFNER, a naturalized citizen of the United States, died in 1874, leaving seven brothers and sisters, or their children, as his only next of kin. They were all non-resident aliens, residing in Wurtemberg, except the defendant Renner and the plaintiff and his sister, and a nephew of the deceased, named John Phillip Michael Hafner, who was a resident alien. The defendant Renner was a daughter of a deceased sister of Carl Hafner, and at his death was the wife of a citizen, and resided in this country. She was the only person who could directly inherit from her uncle, and she took possession of real estate belonging to him in this city, claiming to be the sole owner. Mrs. Wieland, mother of plaintiff, in 1875 sold her right to her brother's property by virtue of the treaty to her son, the plaintiff, who thereupon brought this action to have it adjudged that he and the children of his deceased sister were entitled to share in his uncle's property. Judge Donohue, before whom the case was tried about a year ago, gave judgment in his favor, and the property was then sold. The purchaser refused to take title, claiming that John Phillip Michael Hafner was a necessary party to the action. A motion to compel him to take title was granted, the court giving the following opinion :

Peter Cook, for the motion.

Michael C. Gross, opposed.

LAWRENCE, J.—1. The only one of the non-resident alien heirs of Carl Hafner who took advantage of the provisions of the treaty between the United States and the king of Wurtemberg, was the mother of the plaintiff and of Mrs. Muller, whose children are parties to this action, and I am, therefore, of the opinion that the objection that the alleged non-resident alien infant heirs of said Hafner were not made parties to this action is not valid. The treaty in question provides :

“Article 2. Where, on the death of any person holding real property within the territories of one party, such real property

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would, by the laws of the land, descend on a citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof without molestation and exempt from all duties."

"Article 4. In case of the absence of the heirs, the same care shall be taken provisionally of such real or personal property as would be taken, in a like case, of property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same according to article 2, may take measures to receive and dispose of the inheritance."

The treaty does not provide how the prolongation of the time within which the property therein referred to shall be sold is to be obtained, but as in fact over seven years had elapsed between the date of the death of Hafner and the commencement of this action, and as there is nothing before me to show that such prolongation has been applied for or obtained, I do not see how it can be objected that the title of the purchaser can be endangered after this lapse of time by the probability of an application for such prolongation. If it be said that the alleged alien infant heirs should stand on any better footing than adults, there is nothing in the treaty to that effect, and even if they do stand on a better footing, the lapse of time has been so great that it seems hardly probable that any tribunal to which the facts were presented would now, that judgment has been entered, grant such prolongation.

The case of *Hauenstein agt. Lynham* (100 U. S., 10 Otto, 483) does not aid the purchaser, because in that case by the treaty between the United States and the Swiss confederation of November, 1850, there was no limitation of time within which the right to sell real estate, &c., should be exercised, other than that which the laws of the state or country would permit.

Indeed that case appears on this point to be an authority in

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favor of the plaintiff's position. In the previous treaty a term of not less than three years was allowed for the disposition of the property, and the collection and withdrawal of the proceeds thereof, &c., and the supreme court of the United States say that the provision as to time in the earlier treaty is in effect a statute of limitation. So in this case the right is to be exercised in two years, but may be reasonably prolonged. As there has been no prolongation, the time prescribed by the statute must apply.

2. The resident alien, John P. M. Hafner, did not avail himself of the provisions of the treaty with the king of Wurtemberg. He came to this country after October 17, 1873, at which date he obtained leave to emigrate from Wurtemberg. This was a short time before the death of Carl Hafner, which occurred January 19, 1874. John P. M. Hafner was an infant when he arrived here, and became of age sometime in 1877.

I do not find that the treaty contains any provision extending or amplifying his rights during his minority, but even if it did, as much more than two years elapsed after he became of age, and before the commencement of this suit, and as there has been no prolongation, I think that he has no claim to the estate under the treaty.

3. So far as John P. M. Hafner may claim to succeed to any interest in his uncle's estate on the ground that he was a resident alien at the time of the uncle's death, the decision of the court of appeals in the case of *Luhrs agt Eimer* (80 N. Y., 171) is directly in point. That case holds that the words "resident alien" in the provision of the act of 1845, to enable resident aliens to take and hold real estate (*sec. 4, chap. 115, Laws of 1845*), which enables those answering the description of heirs of a deceased alien to take whether they are citizens or aliens, do not include or designate a "naturalized citizen." In this case Carl Hafner was a naturalized citizen.

4. The act of 1874 (*chap 261 of Laws of 1874*), amending the act of 1845 by inserting after the words "resident alien" the words "or any naturalized or native citizen," does not

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apply to this case, because the rights of the parties had become vested and fixed before that act was passed (*Luhrs* agt. *Eimer*, 80 *N. Y.*, 180).

5. With respect to the objection that there has been any repudiation of the deeds executed by Christine Rosine Wieland under which the plaintiff claims, I find nothing to support the statement in the papers before me. Furthermore, the learned justice before whom this cause was tried has found, as matter of fact, that her interest was duly sold, assigned, conveyed and transferred by said Rosine, under and by virtue of the treaty between the United States and Wurtemberg.

6. As to the claim that as the papers in the partition suit cannot be found in the county clerk's office, the purchaser should not be compelled to complete, the answer seems to be that there is a perfect title by adverse possession, Huxton having conveyed to the party through whom the parties to this action claim, by a deed executed and delivered more than twenty years ago (*See Grady* agt. *Ward*, 20 *Barb.*, 543, 547).

For these reasons I think this motion should be granted, with costs.

SUPREME COURT.

GEORGE S. SCOTT and another agt. JANE R. STOCKWELL
and others.

Foreclosure of mortgage — Usury — Mortgage by wife to secure husband's debt — Surety — Release by extension of time — Pleading in.

A mortgage for \$100,000, executed by A. and his wife to plaintiffs, as mortgagees, covered property of the wife as well as that belonging to her husband. The bond, which was joint and not several, was executed by A. and B., but not by the wife of A. Of the \$100,000 thus loaned \$28,250 was used to pay a debt to C., for which the latter had a specific lien upon the separate property of Mrs. A., which lien was relinquished by such payment. The mortgage was not paid at maturity, and in 1875 and 1876 the mortgagees received from A. several promissory notes, aggregating \$80,000, payable to his order and indorsed by him. The

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receipt given for the notes contained these words: "Each note to be applied to the redemption of bond dated September 5, 1873, at maturity, if paid:"

Held, 1st. That conceding that in equity, as to the amount secured by the mortgage over and above what was used of the moneys realized thereon to relieve her separate property, Mrs. A. occupied, through the mortgage upon her separate estate, the attitude of surety only, yet her property was not released by the acceptance of the promissory notes, the payment of the mortgage debt not having in fact been extended thereby, the notes not having been sold or discounted.

2d. Neither did A. occupy the position of surety, although the bond was joint and not several, and his property and estate were not discharged by his death, he having been liable for the payment of the debt to C., which was paid out of the moneys advanced by the mortgagees.

3d. The omission of the plaintiff to serve a reply to such parts of the answer as set up payments upon the mortgage is not to be considered an admission that such payments were made

Judgment of special term affirmed by general term (28 *Hun*, 641).

Special Term, July, 1882.

A. J. Vanderpoel, for plaintiffs.

Ira D. Warren, for defendants.

VAN VORST, *J.*—The only evidence in support of the alleged usurious agreement, and the fact of usury being exacted, is found in the evidence of the defendant A. B. Stockwell. He testified that it was part of the agreement for the loan that interest at the rate of one per cent per month should be paid. But this testimony is far from satisfactory. An extract from his evidence is in these words: Q. Did you ever pay the one per cent a month? A. I did. Q. In what way? A. I gave him a check for \$2,500. Q. Where is that check? A. The money was paid; I don't know; my brother paid the money. Q. Did you see it paid? A. I don't remember whether I did or not. Q. Will you swear that you saw it paid? A. I will not.

The testimony of Mr. Miller, one of the mortgagees, on the other hand, is quite satisfactory in respect to the retention of this sum of \$2,500 from the sum agreed to be loaned. He

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testifies that it was retained to meet certain taxes and assessments supposed to be a lien on the premises, and that this amount was afterwards allowed and credited on the first six months interest on the mortgage. It is quite clear that it was so allowed, with the interest thereon, which was actually paid by the mortgagees to the borrowers. Miller also positively denies that it was agreed that interest at the rate of one per cent per month should be paid for the loan; and there is no evidence that anything beyond legal interest was either demanded or paid.

The sum of the evidence is that the borrower got the whole amount of \$100,000, for which the mortgage was given, including the \$2,500 at first retained, but in the end allowed as above stated.

The mortgage covered property of Jane R. Stockwell, as well as that belonging to her husband Levi S. Stockwell. The bond was executed by A. B. & Levi S. Stockwell. The loan was made at the instance of the defendant A. B. Stockwell, with whom the whole negotiation therefor was had. A portion of the proceeds, and to the amount of about \$6,000, were used to pay a debt in favor of the Eagle Lock Company, of which latter company the defendant A. B. Stockwell was president, and Levi S. Stockwell was treasurer. It was the pressure for payment of this debt against the Howe Machine Company by the Eagle Lock Company, through Miller, who represented it, which in the end caused the loan to be made. A portion of the sum realized on the loan, and to the amount of about \$28,250 was used to pay and discharge an obligation in favor of the Central National Bank, which debt had been created at the instance of Levi S. Stockwell, acting for himself and his wife, Jane R. Stockwell, and for which the bank had a specific lien upon the separate property of Mrs. Stockwell. And it was only when the bank received out of the moneys realized upon the mortgage in suit, the balance due upon its loan, that it relinquished its lien upon Mrs. Stockwell's property. It cannot, therefore, with propriety be said

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that Mrs. Stockwell occupied the position of surety only, in so far as her obligations under the mortgage are concerned, or that her separate property was mortgaged exclusively for the indebtedness of others. To the extent, at least, that the moneys advanced under the mortgage in question were used to redeem the property from the lien in favor of the Central National Bank, her separate property was in substance mortgaged for her own benefit. Beyond that amount, however, the mortgage moneys were used for the benefit of A. B. Stockwell and Levi S. Stockwell, or the Howe Machine Company, with the management of which they were identified. The mortgage was not paid at maturity, and in the years 1875 and 1876 the mortgagees received from Levi S. Stockwell several promissory notes made by the Howe Machine Company, signed by such company and Levi S. Stockwell, as treasurer thereof, severally made payable to the order of, and indorsed by, Levi S. Stockwell. These notes in the aggregate amounted to over \$80,000. Some of them have been paid and others are unpaid, and some are mere renewal notes in the same series which had not been paid.

The objection is taken on the behalf of Mrs. Stockwell, one of the mortgagors, that the acceptance of these notes by the mortgagees was an extension of the payment of the mortgage, without her knowledge or consent, and that her individual property is therefore discharged from the obligations of the mortgage.

Conceding that in equity as to the amount secured by the mortgage over and above what was used of the moneys realized thereon to relieve her separate property, Mrs. Stockwell occupied through the mortgage upon her separate estate the attitude of surety only, and is entitled to all the privileges and rights incident to such relation, the question arises, was the payment of the mortgage debt in fact extended? No actual agreement was made for any extension. And as the whole mortgage debt was past due at the time the notes were received it may be well questioned whether there was an ade-

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quate consideration for any promise to extend, express or implied (*Kellogg* agt. *Olmstead*, 25 *N. Y.*, 189).

The receipt given for the notes, or some of them, contains these words: "Each note to be applied to the redemption of bond dated September 5, 1873, at maturity, if paid." It cannot be seen that this receipt contains any promise to extend the payment of the mortgage debt. It does, however, engage that the moneys, when paid, shall be applied thereon; and I cannot discover but that Mrs. Stockwell, had she been so disposed, could, at any time before the maturity of the notes, have paid the mortgage and released her property; in which event she could have enforced her rights and remedies against those for whose advantage she had pledged her separate estate. Upon taking up the mortgage she would have been entitled to all collateral securities for its payment, including the notes in question. Mere forbearance to collect the mortgage, and a willingness on the part of the mortgagee, without an agreement, to wait until the maturity of the notes before proceeding to foreclose, would not have the effect to release the property of Mrs. Stockwell (*Mutual Life Ins. Co.* agt. *Davis*, 12 *J. & S.*, and cases cited). I am aware that in the case of commercial paper a note given after the maturity of a previous obligation of that character by way of renewal has been considered as an implied extension of the prior note (*Hubbard* agt. *Gurney*, 64 *N. Y.*, 456). But in this case we have to do with a mortgage, a lien upon real property, an instrument under seal, with terms precisely determined, and the rights and remedies of the parties should not be destroyed, unless by an agreement concerning which there could be no reasonable doubt, which imposed a binding obligation upon the parties affected. The mortgagees, it is true, deposited the notes in bank, but substantially for the purpose of collection only. They neither sold nor caused either of them to be discounted. These notes are, therefore, from the beginning to be regarded as collateral security and not as operating to extend the time of payment of the mortgage. The property of Mrs. Stock-

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well is, therefore, not released from the operation of the mortgage.

It is urged on the behalf of those representing Levi S. Stockwell that he was also a mere surety, and that as the bond was joint and not several his property and estate are discharged by his death.

I cannot accept that conclusion. The bond is joint and not several it is true, but Levi S. Stockwell was, together with his wife, liable for the payment of the debt to the Central National Bank, which, as has been seen, was paid out of the moneys advanced by Miller. But in no light in which I can view this transaction can his property, specifically mortgaged, be released by his death, although his estate may not be liable for any deficiency.

A. B. Stockwell did not sign the mortgage. His discharge in bankruptcy liberated him from liability on the bond. As to him, therefore, the complaint should be dismissed. No payment on the mortgage other than those specifically proved can be allowed.

The omission of the plaintiff to serve a reply to such parts of the answer as sets up other payments, is not to be considered an admission that such other payments were made. An answer of payment in whole or in part is not a counter-claim.

Findings of fact and conclusions of law, and judgment of foreclosure in pursuance of the above, should be prepared by plaintiff's attorney and a copy served on the defendant's attorney with notice of settlement.

Affirmed in Court of Appeals, June, 1883.

Jordan agt. Metropolitan Gas-Light Company.

SUPREME COURT.

CONRAD N. JORDAN agt. THE METROPOLITAN GAS-LIGHT
COMPANY.

New York (city of) — Ferry franchise — Grant of lots under the waters of the Hudson river — Reservation in conveyance for the uses and purposes of public streets — Effect of — Injunction.

Where land under water has been conveyed by the mayor, &c., of New York, "saving and reserving" a portion thereof "for the uses and purposes of public streets, avenues and highways," the grantee takes no substantial right in the part so saved and reserved. It was the intention of the grantors by such clause to retain so much of the land as came within the boundaries of the streets, and it is to be construed in such manner as to carry into effect the intention of the parties.

The use of land so reserved for a ferry and approach thereto is in accordance with such reservation.

Where a ferry has been established for many years at the foot of a street so reserved, with the acquiescence of the grantees of the land out of which the street is reserved, it is presumed that such ferry was established there by the exercise of lawful authority.

Where ferry property has become unsafe and insufficient for the public needs the city may require the same to be made safe and sufficient.

In such case, where the improvements are to be confined within the limits of the street over which the authority of the street has been retained, the grantee cannot interfere to prevent their being made.

The grantee cannot by erecting piers near the street line restrict or limit the right of the city to provide for the improvement of the street.

The city may delegate to another the right to make improvements in streets which it might itself make.

Knickerbocker Ice Company agt. Forty-second Street Railroad Company (ants, 210) explained and distinguished.

Special Term, June, 1883.

MOTION by the plaintiff for the continuation of an injunction restraining the defendant from interfering with the construction of a ferry-house and the improvement and extension of the ferry terminus at the foot of Forty-second street, in the city of New York, and by the defendant for the continuation

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of an injunction restraining the performance of the work by the plaintiff.

Alexander & Green, Charles F. McLean and William C. Gulliver, for plaintiff.

Richard S. Newcombe, John H. Strahan and Albert Cardozo, for defendant.

DANIELS, J. — The ferry property which the plaintiff has been engaged in improving and extending was authorized to be located at the foot of West Forty-second street on or about the 10th of July, 1856, and it actually went into operation on the 2d of June, 1858. It continued to be operated from that time until the plaintiff became possessed of it, under the authority of the common council of the city of New York. Subsequent to the commencement of his possession, and on the 30th of April, 1883, he received a lease of it for the period of ten years from the 1st of May, 1881. The ferry was located and operated under the authority vested in the city of New York by its original charter, and the law afterwards enacted declaratory of its powers and authority, and at the time when it was established no question seems to have been made as to the right of the city to locate and maintain a ferry at that point. Before the time when it was located, the city conveyed the property now owned by the defendant to Charles E. Appleby, who continued to own it until the 1st of February, 1860, when he conveyed it to the defendant. And the fact that the ferry was maintained with the apparent acquiescence of Appleby, the defendant's grantor, and also with that of the defendant itself after it acquired title to the property, very decidedly confirms the presumption that it was established there by the exercise of lawful authority on the part of the city.

Before the plaintiff received his lease the business of the ferry had increased to such an extent as to render the facilities made use of insufficient for the transaction of the business, and the property itself, from the effects of age and use,

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required material improvements to be made in its form, extent and construction. These were not only necessary for the business being transacted by the ferry, but also for the purpose of increasing its capacity to such an extent as to render it adequate to the additional business required to be done by the termini of one or more railroads at Hoboken, on the opposite side of the Hudson river. That the ferry property required to be improved and extended to a very considerable extent for these purposes is clearly established by the allegations of the complaint and the affidavit made in support of the application for the injunction. The city authorities also appear to have taken this view of the propriety of making these improvements and extensions, for on the 10th of March, 1883, the common council adopted a resolution requiring that to be done. Not only the convenience of business, but the safety of persons making use of the ferry, seem to have combined in prompting this action, and after the passage of this resolution an application was made by the plaintiff to the board of department of docks for permission to make these changes and improvements. Previous to the time of making this application the board had adopted a plan for the improvements of this part of the water front of the city. This was done under the authority of chapter 574 of the Laws of 1871, section 99, subdivisions 2 and 3, and the same provisions in substance were afterwards embodied in chapter 15 of chapter 410 of the Laws of 1882.

It has been objected that the action of the board was not taken in the manner prescribed by the statute, but it very clearly appears that the plans which were adopted were presented to and approved by the commissioners of the sinking fund of the city, and that with the action of the dock department itself was all that was essential to render them legal and obligatory. And it was because of this authority and the action taken under it that the application was made by the plaintiff to the board of department of docks for leave to make the changes, extensions and improvements directed by the common council of the city. The proposed changes and

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improvements were wholly located within the bounds of Forty-second street, and the application made to the board was upon the basis that they should be confined within those limits. And the board did, on the 20th of March, 1883, in compliance with the application of the plaintiff, give its consent, by means of formal resolution, to the making of the changes and improvements proposed by him. They were described in detail in the resolution and were wholly restricted to the land lying within the bounds of Forty-second street, and in order to secure their construction under the terms and qualifications directed by the resolution it was finally provided that all the described work should be done under the direction and supervision of the engineer-in-chief of the department of docks.

As the ferry had been located and maintained under the apparent authority of the city, and the plaintiff, by means of its reserved power, was directed to make the improvements deemed to be necessary for the safe and convenient use of the ferry, and the work itself was particularly prescribed and limited by the department of docks, to which authority over it had been given by the act of 1871 and the act of 1882, it certainly had the appearance of regularity as well as legality. It was for the city authorities to determine what was appropriate and judicious upon this subject, and to prescribe the directions adapted to carry that determination into effect. Its supervision and control of the property for the purposes of the ferry seems to have been co-extensive with the exercise of this power. And as the facts have been made to appear, it was not only proper but necessary that the work itself should be done for the convenience as well as safety of the public having occasion to make use of the ferry.

But even if the proceedings of the common council and of the board of department of docks should be regarded as irregular, if no rights of the defendant can be abridged or affected by the irregularity, it is difficult to see how the latter is in the position to make any complaint. If any

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ground upon which it can properly be made exists, the right to make it would seem to be confined either to the common council of the city or the department of docks having jurisdiction and authority over the water front of the city; and as long as neither of these bodies complain of the work, but on the other hand have expressly directed it to be done, the defendant is not in a condition to question the propriety of the use of this authority unless its own rights are to be injuriously affected by the changes to be made in the ferry property.

In support of its objections to the changes proposed to be made the defendant has assailed the work as unlawful under the terms of the deed executed and delivered by the city of New York to Charles E. Appleby, the defendant's grantor. By this deed the city conveyed the property from the original high-water line, at the center of Forty-second street, to the westerly line or side of Thirteenth avenue as that was then projected. On the westerly bounds of Thirteenth avenue the line was extended at right angles in a southerly direction to the center of Forty-first street, and by the description contained in the deed it included the land between the center of Forty-second and Forty-first streets, extending easterly to the original line of high-water mark. But as to so much of the land as was within the boundaries of the streets, the deed contained a clause, "saving and reserving from and out of the hereby granted premises so much thereof as by the said map annexed forms part of portions of the Twelfth and Thirteenth avenues and Forty-first and Forty-second streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned." The clause contained in the deed and those referred to are substantially the same as those inserted in the deed to Astor, which was considered in *Langdon agt. Mayor, &c.* (28 Hun, 156). Whether this clause created an exception or simply a reservation was a subject which was discussed on the hearing of the motion. But it is not deemed to be necessary, as it was not in the case just mentioned, definitely to determine that point, for in either view, whether technically

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an exception or a reservation, the effect of the clause would be essentially the same, for at the time when this deed was executed and delivered the statute was in force which required it to be construed in such a manner as to carry into effect the intention of the parties (3 *R. S.* [7th ed.], 2205, sec. 2). This provision requires the terms made use of to be considered rather than the technical designation which otherwise might be appropriately applied to them. The object of the legislature was to promote the purposes and designs of the parties; and when that can be ascertained it is the duty of the court to carry them into effect. What was intended by the use of this clause is reasonably free from doubt. It was to retain so much of the land described as came within the boundaries of the streets for their use and convenience as avenues of that description. Notwithstanding the nominal extension of the lines in the deed to the center of the streets themselves, it was still the purpose, by means of this clause, to maintain and preserve the appropriation of so much of the property as was required for the streets for the ordinary uses and purposes of public streets; and while the deed in form nominally conveyed the title itself to the land located in the streets, it was still of no substantial value to the grantee as long as this use was saved and reserved to the public. No substantial right, therefore, of the defendant was invaded by providing for the extension of the ferry to the outer bounds of Forty-second street. The defendant itself could make use of the land over which the street was in terms prescribed for no available purpose whatever. The right to regulate, control and improve it for all the purposes of the street was vested in the municipality, and no legal injury beyond that of a mere nominal character could by any possibility in contemplation of law be produced to the defendant by means of this extension of the ferry property (*Matter of Lewis Street*, 2 *Wend.*, 472).

The case of *Knickerbocker Ice Company agt. Forty-second Street Railroad Company* (65 *How.*, 210) has been urged upon the attention of the court as being in conflict with this view,

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but such is clearly not its effect. The point there considered and upon which the injunction was allowed, was under different circumstances and between parties differently related to the subject-matter; and it was because the work was not to be done under any requirement of the city, or as part of any general plan of the dock department and the commissioners of the sinking fund for the improvement of the water front, that it was considered proper by the learned justice presiding in the case to continue the injunction (*Id.*, 222, 223). And it was continued with the qualification that in case the defendant should be required by the city to do the work then in controversy that the injunction should cease to operate (*Id.*, 224, 225). The decision as it was made in this case recognized and confirmed the right of a party to make an improvement of this character within the bounds of the street, notwithstanding the existence of such a conveyance, when that should be required and directed by the constituted authorities of the city. This work was authorized and directed in that manner, and this is accordingly an authority sustaining the plaintiff's right to make the extensions and improvements directed by the common council and the board of department of docks.

As the work has been directed it does not appear to carry the solid filling in the street beyond the bulk-head line established by the department of docks. From that point the ferry property as well as its slip are to be constructed, and the filling in and pavement required east of the ferry-house on the street was clearly authorized by the authority reserved in the deed over the land within the boundaries of the street. But whether the city itself made these particular improvements on the street, or delegated the power to make them to the plaintiff, could be a fact of no moment whatever to the defendant. In either view it was no invasion of its rights, and it involved no more than the use of the power reserved by the deed, which in effect authorized the authorities of the city to improve the street in such a manner as to adapt it to

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safe and convenient use of the public. Under the general authority of the city to establish and provide for maintaining the ferry, and that necessarily reserved by the deed for the improvement and maintenance of the street itself, the plaintiff appears to have been legally authorized to make the changes and improvements proposed to be made by him at the present terminus of Forty-second street.

It has been objected that these improvements are not within the plans and lines adopted by the department of docks with the assent of the commissioners of the sinking fund. But because they do not extend to the outer extremity of the pier line adopted, that result certainly cannot be held to follow. As far as the improvements have been permitted they are substantially within the plans and lines of the dock department; and whether they shall hereafter be projected further into the water must necessarily depend upon what this department may consider to be advisable or judicious hereafter.

The defendant insists, and affidavits have been produced in support of the position, that the improvements and changes will abridge the advantageous use of the property south of the street line described in the deed executed by the city to Appleby. But if that should prove to be the fact, as long as they are to be confined within the limits of the street over which the authority of the city has been retained, it cannot for that reason interfere to prevent the improvements and changes from being made. If the use of its own property shall be abridged in this manner that will result from the fact that its northerly pier line was constructed too near the southerly line of Forty-second street. It could not, by locating it there in that manner, restrict or limit the right of the city to provide for the improvement of this street and of the ferry at the foot of it, as that has been allowed for the purpose of meeting the exigencies and convenience of traveling public.

But, in answer to this objection, the affidavits have been produced showing that a sufficient space will still be left between the northerly wharf line of the defendant's pier and

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the southerly line of the ferry improvement for taking in, loading and discharging vessels. The only abridgement of the defendant's use of its dock is stated to be the fact that so many vessels will not hereafter be able to be there at the same time as have been heretofore. But that it will still retain the ability of taking off and shipping cargoes by adopting regulations suitable for that purpose to such an extent as to meet all the demands of its business, is a fact presumably well shown by the affidavits, and from the distances which appear to have been given, this conclusion seems to be warranted by the circumstances. But if that should not be the case, its dockage conveniences can be extended by changing the northerly line of its pier to a point farther towards the south, and it will be no severe hardship upon the defendant to require so much of a sacrifice to be made, if it shall be required by an improvement which is shown by the affidavits to be so essential to the convenience and safety of the public, and to the proper transaction of the business seeking this ferry. As the facts are presented by the papers, the plaintiff appears to be lawfully entitled to proceed with the enterprise designed to be made, and which has received the sanction and approbation as well as the direction of the authorities of the city entitled to be heard upon the subject.

They do not complain, but on the other hand have approved and required the projected work to be done, and as these authorities have the legal right to control the street and its terminus in this manner the defendant cannot lawfully prevent the directions given from being carried into effect. The injunction applied for by the plaintiff will, therefore, be allowed, and that applied for by the defendant be denied.

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SUPREME COURT.

EDWARD BRAND agt. PHOEBE HAMMOND and RICHARD
HAMMOND.

*Answer — Complaint upon promissory note made by defendants jointly —
Answer by wife that at time of its execution she was a married woman and
the note was given for the indebtedness of a third party is frivolous.*

When the complaint was upon a promissory note made by the defendants jointly, and the defendant P. H. answering alleged simply that at the time of its execution she was a married woman, and that the note was given for the indebtedness of a third party, one H. S. Hammond :

Held, that the answer was frivolous. It is not a sufficient allegation of coverture to defeat the action.

The answer in order to present a defense should have set forth that the defendant was a married woman, and further that the note was not given in the course of her separate business or for the benefit of her separate estates.

Greene Special Term, June, 1883

MOTION to strike out answer as frivolous.

James B. Olney, for motion.

B. B. Bouton, opposed.

OSBORN, J. — I think the answer interposed by the defendant herein is frivolous.

The complaint is upon a promissory note made by the defendants jointly. The defendant Phoebe Hammond answering, alleges simply that at the time of its execution she was a married woman, and that the note was given for the indebtedness of a third party, one H. S. Hammond.

I do not regard this statement as a sufficient allegation of coverture to defeat an action on a note under our present statute. The tendency of legislation of late years has been towards removing the incapacity of a married woman in all matters of business and contract. Her right to conduct all

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kinds of business is recognized, and a note given in the course of her separate business or for the benefit of her separate estate is as valid by statute as though she were a *feme sole*. If the fact be that she is conducting a business or has a separate estate, and that a note was given in the course of that business or for the benefit of the estate, it would be no defense to allege that when the note was given she was a married woman. Nor is it necessary to allege in the complaint that she has a separate estate or conducts a separate business. Coverture is an affirmative defense, and all matters necessary to sustain it must be pleaded. A married woman may in many instances be liable on her note. Coverture is only a defense where the note was given outside of her separate business or for purposes which did not or were not intended to contribute to the benefit of her separate estate. When she interposes coverture as a defense she must show that the case is one in which a married woman's contract would not be enforced. For a married woman can make contracts which will bind her (*Cashman* agt. *Henry*, 75 *N. Y.*, 103; *Crisfield* agt. *Banks*, 12 *Week. Dig.*, 150).

This answer in order to present a defense should have set forth that the defendant was a married woman, and, further, that the note was not given in the course of her separate business or for the benefit of her separate estate.

I think, therefore, this motion should be granted, with costs.

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N. Y. SUPERIOR COURT.

In the Matter of the Application of WILLIAM C. EMMET, for a writ of *certiorari* to review his removal by ALLAN CAMPBELL, comptroller.

New York (city of) — Removal of clerk of city government — His right to representation by counsel.

A regular clerk of a department of a city government, whom it is proposed to remove, has the right to be represented by counsel in making the explanation provided by section 28, chapter 335, Laws of 1873, on being informed of the cause of the proposed removal.

Special Term, June, 1883.

MOTION on order to show cause why writ of *certiorari* should not issue against the comptroller, &c., in relation to the removal of the petitioner from office and the right of petitioner to be represented by counsel, &c.

O'GORMAN, J. — No affidavit has been presented to the court on behalf of the respondent, and this motion must be heard and decided on the moving papers of the petitioner alone; the comptroller, as far as this contention is concerned, admitting the truth of all the facts therein alleged, and claiming that they do not constitute any valid cause of complaint against him. The only controversy is as to the right of a regular clerk of the finance department to be represented by counsel in making the explanation provided by section 28, chapter 335, Laws of 1873. If this contention be not well founded and the petitioner had no right to be represented by counsel, and the comptroller had the right to refuse to hear counsel on behalf of the petitioner, then the writ should not be issued.

It is conceded on both sides that what were the respective rights and duties of the petitioner and of the comptroller in the transaction must be gathered from section 28, chapter 335, Laws of 1873, being the same provision as is now incorporated

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in section 48 of the act of the legislature passed in 1882, known as the "New York City Consolidation Act," and being as follows:

"But no regular clerk or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation; and in every case of a removal, the true grounds thereof shall be forthwith entered upon the records of the department or board. In case of removal a statement showing the reason thereof shall be filed in the department."

The question now is whether petitioner being threatened with removal had the right to be represented by counsel in making his "explanation."

The force and effect of that part of the section relating to removal of regular clerks, &c., have been judicially considered in *People ex rel. Munday agt. Fire Commissioners* (72 N. Y., 446).

In that case the court of appeals held "that the statement of cause of removal given by the fire commissioners to the relator (one of the regular clerks of that department) was frivolous, an evasion of the statute, and a trifling with the procedure prescribed for that action; that the restriction contained in the section referred to was not shadowy or unsubstantial, but was intended as a substantial limitation of the general power of removal conferred on the several departments of the city government, and to secure the continuance in office of the person named, until a reasonable cause, other than the pleasure of the heads of departments or a change in the political character of the majority, should exist for their removal."

"Courts" (says the learned judge who delivers the opinion) "cannot assume that the legislature intended a vain thing, and have inserted a clause apparently materially affecting the powers of the departments, but which is in fact without efficacy."

"The removal must be for cause, and the process for

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removal is prescribed by statute and must be pursued. An explanation may consist either of excusing any delinquencies or apparent neglect or incapacity, that is, explaining the unfavorable appearances or disproving the charges.

“That something substantial is intended by the statute is made evident from the fact that the ‘true grounds’ of removal are to be entered on the record, and a statement showing the reason therefor filed in the department” (*See, also, People ex rel. Sims agt. Fire Commissioners*, 73 N. Y., 440).

With this opinion of the court of appeals before them, the supreme court of this district considered the case of *People ex rel. Keech agt. Thompson* (26 Hun, 28). There Keech, the relator, the person threatened with removal, was a regular clerk in the department of public works, and received a letter from a commissioner setting forth, with apparent clearness and detail, causes for the removal of the relator in compliance with said section 28. In his letter the commissioner fixed a time and place when the relator would be allowed an opportunity of making an explanation.

At the time and place assigned, the relator appeared in person and accompanied by his counsel, and presented an explanation in writing, and also demanded a trial, with all the rights and incidents of a trial at law. This was refused: but counsel attended on the part of the relator Keech, before the commissioner, without objection, and took part in such proceedings as then occurred.

The supreme court at general term held that the relator there had no right, under said section 28, “to such a full judicial trial” as would be allowed to a person claiming the protection of section 25 of said act.

The court says (judge DAVIS delivering the opinion): “Neither the spirit nor the letter of this provision (that is, the provision that the accused officer shall be allowed an opportunity for explanation) requires any mode or form of trial beyond that expressly indicated, to wit: the presentation of charges sufficient in themselves, if true, to justify removal,

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a notice to the officer of such charges, and an allowance to him of an opportunity of explanation."

The learned judge further held, on the authority of *People ex rel. Folk agt. Board of Police* (69 N. Y., 409), that the statute committed to the commissioners a discretionary power to decide both as to the denial and the explanation of the officer, which was not subject to review by the courts. It may be remarked that in the case of *People ex rel. Folk agt. Board of Police* (*supra*) the learned chief justice CHURCH alludes to the fact that the accused had had a full and fair trial and had the benefit of counsel to conduct his defense.

In neither of these cases (*People ex rel. Munday agt. Fire Commissioners* or *People ex rel. Keech agt. Thompson*) is there any decision that the investigations contemplated under said section 28 are other than judicial trials. In the latter of these cases (*People agt. Thompson*) the general term held that the accused, under section 28, had no right to such a full judicial trial as one accused under section 25 of said act; but neither of these cases gives any support to the proposition that in presenting his explanation under section 28 the accused could rightfully be denied the assistance of counsel. On the contrary, in each of these cases the accused was represented by counsel without objection, and in one of the cases above cited the fact that he was so represented was referred to by the court of appeals as an element in the argument.

It is therefore necessary to seek elsewhere for any rule of law applicable to this case.

By the Revised Statutes (*vol. 2, p. 285*), it is provided "that every person of full age and sound mind may appear by attorney or solicitor, as the case may require, in every action or plea against him in any court whatsoever."

The state constitution provides (*art. 1, sec. 6*) "that in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel, as in civil action; and also that no person shall be deprived of property without due process of law."

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Neither of the cases above cited holds that the action of the head of the department making charges under said section 28, and requiring explanation of said charges, does not involve a judicial trial of some kind. On the contrary, the language of the learned judge in *People agt. Thompson* implies that the proceeding under section 28 is a judicial trial, although not so full a judicial trial as is allowed under section 25.

On this question judge DILLON, in his book on municipal corporations (*sec. 191*), says: "The proceedings in all cases where a motion is for cause is adversary or judicial in its character, and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed."

Under each of these sections, 25 and 28, in my opinion, a judicial trial is intended; but in the latter case it has been held that the scope and extent of the judicial trial are limited within narrower bounds than in the former. That a judicial trial was contemplated by the legislature in these cases seems consistent, as well with the language of the statute as with its manifest intent. The regular clerks, the process of whose removal is provided for in section 28, are servants of the people, doing work for the people, and protected in their tenure of office, not because of any exaggerated care or tenderness for them personally, but in order to secure the people from the loss of competent and worthy servants because of the caprice or partisan motives of their superior officers. For this purpose it is enacted that they shall not be removed without cause stated, and an opportunity to explain that the cause stated is insufficient or untrue. The office of the clerk is thus protected, and he cannot be deprived of it or of its emoluments without due process of law; the nature, mode and form of which are pointed out in said section 28.

This process involves a charge made and communicated to the accused, an opportunity to him to explain or defend himself, a trial, limited no doubt in its scope, but yet resulting

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either in acquittal or in conviction, and judgment of removal and consequent loss of the office and the emoluments attached to it.

This judgment, according to the opinion of the general term in *People* agt. *Thompson*, rests wholly in the discretion of the accusing officer; and that discretion is not open to review by the ordinary courts of law, but is final and irrevocable, unless perhaps the abuse of that discretion be flagrant and undoubted (*People ex rel. Keech* agt. *Thompson*, 26 *Hun*, 28).

That in such a proceeding, involving a final decision as to private property, reputation, rights and interests so large, the assistance of counsel should be denied to the accused, seems unreasonable and not in accord with the provisions of the State Constitution and of the Revised Statutes, and with the general practice of courts of justice in all judicial and *quasi* judicial investigations. It may well be that, under the decisions above referred to, the sphere of counsel's action may be confined in the one case within narrower limits than in the other. But that is not the question now. When counsel, appearing for a person accused under said section 28, attempts to exceed his legitimate powers, it will be time enough for such a contention. It is not to be presumed now that counsel will fail to understand the extent and limit of his duties; but if he attempts to exercise powers not allowed under section 28, but allowed under section 25, the occasion will then arise for a judicial determination of the question how far his legitimate professional functions extend.

The only question now to be determined is whether the presence and aid of counsel can be peremptorily refused to an officer desiring to present his explanation under section 28. If he had, under section 28, the right to the aid of counsel in presenting his explanation, the denial of that right is in effect the denial to him of the opportunity for explanation which section 28 allows him. The officer cannot be removed until he has been informed of the cause of the proposed removal, and has had an opportunity of making an explanation.

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The provisions of the law under our consideration is intended to be not an increase of power in the hands of the head of the department to remove his inferior officers but a substantial limitation and check on such power. In trials of accused officers, held under section 25 of the act above referred to, the assistance of counsel has never been denied to the accused; yet there is no special provision in the section reserving that right to the accused, nor is the subject in any way referred to. I see no reason in law or in common sense justifying the denial of the aid of counsel to the accused under section 28. It cannot, I think, be successfully argued that in proceedings under section 28 no contention can possibly arise in which the functions of counsel can be legitimately exercised.

In *People ex rel. Munday agt. Fire Commissioners* (*supra*), the charge made against the relator under section 28 was held by the court of appeals to be frivolous and an evasion of law. The presence and aid of counsel in that case may have been necessary in so conducting the proceeding on the part of the accused, that the insufficiency and illegality of the action of the fire commissioners might be made apparent to the court and in preventing the removal of an officer in flagrant violation of law. The faculty of ready and effective speech is not given to all men, and the denial of assistance of counsel to represent them and speak for them might in conjunctures of this kind often be in effect a denial of justice.

These are some of the many reasons which lead me to the conclusion that the aid of counsel should not have been denied to the petitioner in the case at bar. The denial to him of the aid of counsel in making his explanation was, in my opinion, a denial, in effect, of the "opportunity for explanation," which the law required that he should have had before the power to remove him became vested in the head of the department.

The prayer of the petitioner, William C. Emmett, is granted. The order to be settled by me on due notice to the comptroller or his attorney.

Gibbon *et al.* agt. Freel.

COURT OF APPEALS.

JOHN GIBBON *et al.*, plaintiffs and appellants, agt. JOHN FREEL, impleaded, &c., respondent.

Marine court practice — Summons — Error in, as to time in which defendant must appear may be amended — Service by publication — Time of service when the last day occurs on Sunday — Attachment — Code of Civil Procedure, sections 416, 638, 723, 8165.

An error in a summons as to the time within which the defendant must appear and answer does not render the process void. It constitutes a mere irregularity capable of amendment *nunc pro tunc*.

When the statute requires service of process to be made out of the State or by publication within thirty days, and the thirtieth day occurs upon Sunday, a service made or publication commenced on the thirty-first day is a compliance with the statute.

Decided, June, 1883.

THE plaintiffs brought suit in the marine court to recover \$1,238.86, due upon contract, and the defendant Freel being a non-resident of the State, the plaintiffs procured an attachment against his property, under which a levy was made on property sufficient to satisfy the claim and costs. An order of publication was subsequently obtained, and on the thirty-first day after the attachment was granted (the thirtieth day being Sunday) publication of the summons was commenced, and on the same day process was served upon Freel out of the state. The summons, as served and published, required the defendant to answer the complaint within "six" days, whereas the statute applicable to the marine court requires that where the summons is served pursuant to an order of publication it must give the defendant "ten" days to answer, and that the time must be correctly stated in the summons (*Code, sec. 3165*). The defendant moved to vacate the attachment and other proceedings on account of this error in the process and upon the ground that the summons was not served in time, but the Court at special term denied the motion and allowed the pro-

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cess to be amended *nunc pro tunc* according to the practice of that court, as declared in the marine court appendix (p. 4). This order was upon appeal affirmed by the marine court, general term. (An opinion was filed by HALL, J., at special term, and by McADAM, J., at general term.) Upon further appeal to the court of common pleas, that court without filing any opinion, reversed the orders made below and vacated the attachment, holding that the marine court had no power to allow such amendment, the time within which to serve the summons under section 638 of the Code of Civil Procedure (thirty days) having expired, and the jurisdiction acquired by the attachment, having been lost. The plaintiffs having obtained leave so to do, appealed to the court of appeals, which court reversed the order of the common pleas and reinstated the attachment.

William Blaikie, for appellants.

A. Ascher and J. J. Adams, for respondents.

EARL, J. — A summons for the commencement of this action was issued out of the marine court of the city of New York, in which the defendant Freel, who was a non-resident of the state, was required to answer in six days. The summons was in the form generally required to be used in that court (*Code, sec. 3165*). Thereafter, on the 16th day of June, 1882, the plaintiffs obtained a warrant of attachment from the same court, by virtue of which Freel's property within this state was attached, and on the fourteenth day of July thereafter they procured an order for the publication of the summons against him. Subsequently, on the seventeenth day of July, the summons was served on him without the state.

Thereafter Freel, by counsel who appeared specially for that purpose, made a motion to vacate the attachment, on the ground that the summons was not served within thirty days after the granting of the attachment, and also that it required

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him to answer within six days instead of ten days, and the motion was denied at the special term of the marine court; and an order was made that the summons be amended *nunc pro tunc* as to Freel, so that it should read that the time within which to answer and serve a copy of his answer on plaintiff's attorney be ten days, and that the summons have the like force and effect as if it had originally read ten days instead of six, and that the service of a copy of the order on Freel's attorney be sufficient service and notice to him that the summons had been so amended, and that he have until the expiration of ten days to serve his answer. From the order of the special term he appealed to the general term of the marine court, where it was affirmed. He then appealed to the court of common pleas, where the orders of the marine court were reversed. The plaintiffs then, by leave of the common pleas, brought this appeal.

We are of opinion that the summons was served in time. The day on which the service was made was the thirty-first day after the granting of the attachment. But the sixteenth day of July was Sunday, and hence the service on the next day was in time under section 788 of the Code, which provides that if the last day in such a case occurs on Sunday, it must be excluded from the count. Thus, the service was made within thirty days as required by section 638. Subdivision 2 of section 3165 of the Code provides that "when an order directing personal service of the summons without the city of New York, or by publication, is granted, the summons must state that the time within which the defendant must serve a copy of his answer is ten days after service thereof, exclusive of the day of service." This summons should therefore have required the defendant to answer within ten days instead of six. The marine court obtained jurisdiction of the action from the time of the granting of the attachment (*Code, sec. 416*). That section provides that "a civil action is commenced by the service of a summons, but from the time of the granting of a provisional remedy,

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the court acquires jurisdiction, and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional, and liable to be divested in a case where the jurisdiction of the court is made dependent by a special provision of law upon some act to be done after the granting of the provisional remedy."

The claim of the defendant is that the court lost jurisdiction, because the summons requiring the defendant to answer within ten days was not served upon him within the time required by the statute; that the service of a summons requiring him to answer within six days was to be treated as if no summons whatever had been served upon him. But the summons was not an absolute nullity. The insertion of six days instead of ten has an irregularity merely. The defect could have been waived by the general appearance of the defendant, or consent expressed or implied. A judgment entered by default after the service of such a summons, would not have been absolutely void, but simply irregular or erroneous, to be corrected by motion or by appeal (*Watkins* agt. *Stevens*, 3 *How. Pr.*, 28; *Clapp* agt. *Graves*, 26 *N. Y.*, 418; *McCann* agt. *The Railroad Co.*, 50 *N. Y.*, 176; *Bradbury* agt. *Van Alstyne*, 45 *Barb.*, 145; *Holmes* agt. *Russell*, 9 *Dowl.*, 487). The summons was, therefore, amendable under section 723 of the Code, which provides that "the court may upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, on such terms as it deems just, amend any process, pleading or other proceeding by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect." That section applies to the marine court, which is a court of record, and gave ample power to that court to amend the summons.

We are, therefore, of the opinion that the order of the common pleas should be reversed, and that of the marine court affirmed, with costs.

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SUPREME COURT.

METROPOLITAN ELEVATED RAILROAD COMPANY and SYLVESTER H. KNEELAND agt. THE MANHATTAN RAILWAY COMPANY and THE NEW YORK ELEVATED RAILROAD COMPANY.

Injunction — New undertaking — Code of Civil Procedure, section 629, amendment of 1883 — When injunction order must be vacated — To whom application should be made.

It is a condition precedent to the right of a judge to act under the amendment of 1883 to section 629 of the Code of Civil Procedure, that he should be satisfied that the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money. Affidavits which are but expressions of opinion not furnishing the court with any facts upon which it can determine for itself whether the alleged wrong or injury is not irreparable, and whether it "is capable of being adequately compensated for in damages," are insufficient.

The fair and reasonable interpretation of the amendment to this section of the Code is, that the application for the vacation of the injunction should be made to the court or judge who hears the application to vacate or modify the injunction order.

Did the legislature intend that the injunction should be vacated where the court, after hearing both parties, had determined that the alleged agreement, the execution of which the injunction was designed to restrain, is absolutely null and void? *Quære.*

New York Chambers, June, 1883.

THE action is brought to set aside the "merger agreement," and the motion before the court was to vacate, under the new amendment of the Code, a preliminary injunction restraining the carrying out of the agreement. Following is the opinion:

David Dudley Field, for motion.

F. C. Barlow, opposed.

LAWRENCE, J.—Assuming that this application is properly before me, it is a condition precedent to my right to act that I should be satisfied that the alleged wrong or injury is not

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irreparable, and is capable of being adequately compensated for in money. Now in this case I have no data which enables me to determine either that the alleged wrong or injury is reparable, or that it can be adequately compensated for in money.

The affidavit of Mr. McWilliams, upon which the order to show cause was obtained, alleges that he is well informed as to the condition of the three companies, and that to the best of "my knowledge and belief no injury can arise to the plaintiff or its stockholders by the carrying out of the said merger agreement; but if any injury to the plaintiff or its stockholders could possibly arise, it would not be irreparable, and would be capable of being adequately compensated for in money, and the defendants are ready and willing and offer to execute any undertaking, in such form and amount, and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating the said injunction order."

This is but the expression of the opinion of Mr. McWilliams upon the subject. He furnishes the court with no facts upon which the court can determine for itself whether the alleged wrong or injury is not irreparable, and whether it "is capable of being adequately compensated for in damages" (*See chap. 404 of the Laws of 1883*).

The value of the stock of the several roads is nowhere stated in his affidavit, nor can I determine, even if I should reach the conclusion that the injury is not irreparable and that it can be compensated for in money, what the amount of the security to be given as a condition of the vacating of the injunction should be. The imperfect data presented to the court in this respect would require me to deny this motion; but there are other grounds on which I am of the opinion that it should be denied. In the first place, I think that the fair and reasonable interpretation of the amendment to the Code (*chap. 404 of the Laws of 1883*) is, that the application for the vacation of the injunction should be made to the

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court or judge who hears the application to vacate or modify the injunction order.

In this case, such a hearing had taken place before presiding justice DAVIS, who required the plaintiffs to be notified, and both parties were heard, and the application was denied. The case was subsequently argued before justice BARRETT on the return day, and the injunction continued by him without leave to renew being given to the defendants. The hearing contemplated by the amendment to the Code had been had at the time the order to show cause now under consideration was obtained. The statute nowhere says that it is to have a retroactive effect, nor that where the hearing had already been had at the time of the passage of the statute the enjoined party could apply to another justice to vacate the injunction. In the case before chief justice DALY, the hearing, if I correctly apprehend the facts, was in progress before him at the time the act was passed. He was the "court or judge" having the application under consideration, and the case came, therefore, within the express terms of the statute. Another distinction between that case and the case at bar is that it related to the October agreements, and the damages arising from the carrying out of those agreements might be compensated for in money. Here the merger agreement is involved, by which, if carried into effect, the plaintiff, the lessor corporation, will be entirely merged into or absorbed by the Manhattan Company, the lessee corporation. It is difficult to see how such an obliteration of the plaintiff can be compensated for in money. And if it can be, as before stated, I have no data presented to me which will enable me to estimate the proper amount of pecuniary compensation.

Again, I am still strongly impressed with the conviction that the legislature did not intend that the injunction should be vacated where the court, after hearing both parties, had determined that the alleged agreement, the execution of which the injunction was designed to restrain, was absolutely null and void. The effect of vacating this injunction would be to

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enable the defendants to carry out an agreement which the court has said is a nullity; in other words, to validate an alleged contract which the court has said is an invalid contract. It is said that as there has been no trial of this action that the decision in question was a mere expression of opinion on the part of the justice who rendered it. It was a decision made after hearing both parties, and it remains unreversed and is binding upon me sitting at chambers or special term. It is not, however, necessary to definitely decide this point, for the reason that the other considerations to which I have referred must lead to denial of the motion, with costs.

U. S. CIRCUIT COURT.

DWIGHT P. CRUIKSHANK agt. THE FOURTH NATIONAL BANK.

Removal of cause — National bank — Actions against, removable to circuit court of the United States.

Every action against a national bank is an "action arising under the laws of the United States," and as such is removable to the circuit court of the United States under section 2 of the removal act of 1875.

Southern District of New York, June, 1883.

THIS action was begun in the court of common pleas for the city and county of New York. In due course defendant filed a petition for removal to the circuit court with accompanying bond. The ground of removal was that the action arose under the laws of the United States for the reason that the defendant was incorporated under an act of congress, and that such act was, therefore, an ingredient in the cause. Plaintiff moved in the circuit court to remand, and the following opinion was rendered upon the motion:

William Hildreth Field, for motion.

David J. H. Wilcox, opposed.

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WALLACE J.—The right of the defendant as a corporation created by the laws of congress to remove a suit brought against it in a state court is clearly conferred by section 2 of the removal act of 1875, if such a suit is one arising under the laws of the United States. That section is very comprehensive, and among the new provisions which it introduces is that which authorizes the removal of suits to the circuit court, arising under the constitution and the laws of the United States, irrespective of the citizenship of the parties. If the suit is one of this character it is quite unnecessary to explore previous enactments in order to ascertain what rights of removal had been granted or withheld, because the language is clear and explicit, and the whole subject of removals was under consideration by congress. In conferring the right upon either party to remove a suit into the circuit court, "arising under the constitution or laws of the United States," the section employs the language of the constitution which defines the extent of the judicial power of the United States, and lodges it in the supreme court and such inferior courts as the congress may from time to time ordain and establish. The evident purpose of the section was to confer the right of removal upon litigants to the full measure of the constitutional grant of power. In the language of the court in *Taylor agt. Rockfeller* (18 *Am. Law Reg.* [N. S.], 298), it seems to have been intended to confer on the circuit courts all the jurisdiction which, under the constitution, it was in the power of congress to bestow. What is meant by a case arising under the laws of the United States, as expressed in the constitution, has not been doubtful since the case of *Osborne agt. Bank of the United States* (9 *Wheat.*, 738). It was there declared that any suit in which a law of congress was of necessity an ingredient in the case was a case arising under a law of the United States, notwithstanding the main controversy might depend altogether on questions unconnected with any such law. Accordingly, it was determined that any suit brought by a corporation created by congress was one arising under

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the laws of the United States, although the questions upon which its decision might depend were to be solved by the general principles of common law or equity, because the law of congress which created the corporation and bestowed upon it all the facilities and capacities which it possessed, was of necessity an ingredient in the case. In the language of chief justice MARSHALL, "every act of the bank arises out of this law." It was decided by this court in *Union Pacific Railroad Company* agt. *McComb* (1 *Fed. Rep.*, 796), that a suit by a corporation created by act of congress is a suit arising under the laws of the United States, within the meaning of section 2 of the Removal act of 1875. A suit brought against such a corporation must fall within the same category. Every act of such a corporation derives its legal complexion and attributes from the law which creates it and endows it with the faculty of acquiring rights and committing wrongs. A suit cannot be even maintained against it without invoking the law of congress. The cases of *Pettilon* agt. *Nobies* (7 *Biss.*, 44) and *Wilder* agt. *Union National Bank* (12 *Chicago Legal News*, 84), holding that a national bank association cannot remove a suit brought against it in a state court, notwithstanding the section in question, have not been overlooked. Great respect is due to those judgments, but it is believed that they are not a correct exposition of the section.

The motion to remand is denied.

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N. Y. SUPERIOR COURT.

FREDERICK W. MUSER and others agt. JULIA MILLER.

Husband and Wife — Arrest of married women — May be held upon an order of arrest in all cases the same as if she were unmarried — Code of Civil Procedure, sections 558-450.

The reason of the common-law rule in regard to the joinder of the husband with the wife has wholly ceased to exist; and the rule itself has been abrogated in all cases, of torts as well as contracts, affecting the separate property of a married woman, or connected with or arising from the management or control of her business; and the exemption of a married woman from arrest, which sprang solely from the reason of the rule, has ceased in all cases in which the law expressly authorizes the arrest of females in general terms.

Special Term, June, 1883.

MRS. JULIA MILLER is now in Ludlow street jail, upon an order of arrest in a suit brought to recover the value of a large quantity of laces stolen from the firm by one of its employes, and which it was claimed Mrs. Miller received, knowing that it was stolen property. Motion is made to vacate the order upon the ground that she being a married woman cannot be held upon an order of arrest in a civil action.

D. M. Porter, for plaintiffs.

Charles S. Spencer, for defendant.

FREEDMAN, J. — The plaintiffs have made out a *prima facie* case against the defendant Julia Miller which has not been overcome by the proofs adduced by her to such a degree that I can determine the merits. The testimony of James J. Madden, the thief, and Fannie Lewis, the receiver, is corroborated in several particulars, and especially by the circumstances that some of the stolen goods have been shown beyond controversy to have been in the possession of the defendant.

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Her statement by affidavit, that she paid a fair value for the goods she did purchase from the receiver, cannot overcome the case made against her, because from the fact that she was a dealer in laces since 1877, and a purchaser from leading merchants in New York, and had even received goods on consignment from the plaintiffs in this action, the inference may be drawn that her statement is not true, and that she knew at the time that she was getting the goods very much below their intrinsic as well as market value. Without going into particulars it is sufficient to say that much of what the defendant shows may be true, and yet a *prima facie* case remains against her that she committed at least a willful injury to plaintiffs' property within the meaning of section 553 of the Code of Civil Procedure. By the affirmance of the court of appeals (64 N. Y., 625) of *Duncan* agt. *Katen* (6 Hun, 1) it is now settled that in such a case a willful injury to property does not mean an injury merely to the thing itself but an injury to the owner's right in and to the thing.

The case at bar, therefore, falls within that class of cases in which the rule prevails that the court will not try the merits upon affidavits. This being so the order of arrest cannot be vacated unless the defendant's point is well taken, that because she is a married woman no order of arrest will lie against her under any circumstances.

At common law a married woman could not be held to bail in an action founded upon her personal tort, though the husband might be held and might be compelled to give bail for both (*Grah. Pr.*, 127; *Anonymous*, 1 *Duer*, 613; *Schaus* agt. *Putscher*, 16 *Abb. Pr.*, 353, note). That the Code in force before the Code of Civil Procedure did not change the rule upon this point was distinctly held in *Solomon* agt. *Waas* (2 *Hilt.*, 179).

The necessity for holding the husband arose from the legal effect of the marriage relation. At common law the husband and wife by marriage became one person in law, that is, the very being or legal existence of the woman was suspended

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during the marriage, and incorporated or consolidated into that of the husband. But the necessity for such joinder was not, strictly speaking, because the husband was absolutely liable, but it grew out of the fact that a suit could not be maintained against a wife alone during coverture (*Bishop on Married Women*, sec. 254).

Under the statute of this state any married woman may take and hold real as well as personal property, separate and apart from her husband, and enjoy the same, and the rents, issues and profits thereof, in the same manner as if she were a single female; and she has express authority to bargain, sell, assign and transfer her separate personal property to carry on any trade or business, and perform any labor or services on her sole and separate account. The power thus conferred to carry on a trade or business includes the ability to make bargains and contracts in relation to it in almost any mode known to the law, and in accordance with the practice of the commercial community, and such bargains and contracts have been held valid against her, notwithstanding her coverture, provided they were made in the course of her trade or business, and as an incident to it. Upon any such bargain or contract she could, since 1860, sue and be sued in the same manner as if she were sole, and the same may be said generally concerning all matters having relation to her sole and separate property.

It was held, however, that these changes by statute did not alter the common-law liability of the husband for the mere personal torts of the wife, but that the rule was changed only in cases of torts committed in the management and control of her separate property (*Baum agt. Mullen*, 47 *N. Y.*, 578; *Kowing agt. Manley*, 49 *N. Y.*, 192). But even then the husband was held in some cases to be still a necessary party to the action.

Thus the rule as to the necessity of the joinder of the husband with the wife, in a case of tort committed by the wife, remained until the enactment of the Code of Civil Procedure.

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Section 450, as originally enacted, read: "In an action * * a married woman appears, prosecutes or defends alone * * as if she was single." In his notes, Mr. Throop states that that section was intended to sweep away all distinctions between a *feme sole* and *feme covert* in respect to suing and being sued, and in *Janinski* agt. *Heidelberg* (21 *Hun*, 439) it was held by the general term of the supreme court that the language used was comprehensive enough to do it.

In 1879, section 450 was amended by adding at the end thereof the further express provision that in any action or special proceeding affecting the separate property of a married woman, it is not necessary or proper to join her husband with her as a party.

Since that amendment it was held in *Fitzgerald* agt. *Quann* (62 *How.*, 331) that it is now no longer necessary or proper to join the husband as a defendant in an action against the wife for her personal tort, though such tort was wholly unconnected with the wife's separate estate or the management or control of her business, and that the reason of the rule in regard to the joinder had wholly ceased to exist.

For the purpose of determining the motion before me, it is not necessary to go quite as far. It is sufficient to hold that the reason of the rule in regard to the joinder has wholly ceased to exist, and the rule itself has been abrogated in all cases, of torts as well as contracts, affecting the separate property of a married woman or connected with or arising from the management or control of her business. For it is conceded that the wrongful acts complained of in the case at bar were committed in the course of the defendant's business as a dealer in laces. It follows, then, that, if to the extent stated the reason of the rule has ceased to exist and the rule itself has been abrogated, the exemption of a married woman from arrest which sprang solely from the reason of the rule, must cease whenever the rule ceases, in all cases in which the law expressly authorizes the arrest of females in general terms.

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In looking for such authority it will be found that section 553 of the Code of Civil Procedure gives the right of arrest during the pendency of the action against any woman in an action to recover damages for a willful injury to person, character or property.

Having already shown that the case made out against the defendant is one which falls within the class of cases specified in section 553, and it appearing that the wrongful acts charged against the defendant were committed by her in the management of her business, she is not entitled to have the order of arrest vacated for the sole reason that she is a married woman. From the examination so far made, it appears that no ground whatever exists for the vacation of the order.

As to reducing the bail, I have also failed to discover any ground upon which the defendant can be relieved. According to some of the testimony, the defendant had all the goods which were stolen from the plaintiffs, and if the jury should under all the circumstances, find such testimony worthy of belief, their verdict will be for an amount which, with interest and costs, will exceed the amount of bail specified in the order. In view of such contingency the plaintiffs have a right to have the bail maintained as originally fixed.

The only relief I can grant is to order an immediate trial of the issues by jury, on the ground of the actual imprisonment of the defendant.

Motion to vacate order of arrest denied, with ten dollars costs.

Stuckle agt. Tehuantepec Railway Company *et al.*

SUPREME COURT.

HENRY D. STUCKLE, appellant, agt. THE TEHUANTEPEC RAILWAY COMPANY *et al.*, respondents.

Costs — Extra allowance cannot be granted upon an interlocutory judgment — But one allowance is contemplated by the Code, and that only upon final judgment — Code of Civil Procedure, section 3253.

An additional allowance, under section 3253 of the Code of Civil Procedure, cannot be granted upon an interlocutory judgment sustaining a demurrer with leave to amend. The Code contemplates but one allowance, and that only upon final judgment.

First Department, General Term, June, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order of the special term granting extra allowance on directing judgment for defendant on demurrer to complaint.

F. R. Coudert, for appellant.

Albert Stickney, for respondent.

DAVIS, P. J.—The judgment of the special term sustained the demurrer, and ordered an interlocutory judgment thereon for the defendants, but provided that the plaintiffs may, at any time within twenty days after service of a copy of the order sustaining the demurrer, and upon payment of the costs of this action, serve an amended complaint herein, and that upon failure to do so, and upon proof by affidavit of such failure, the defendants might enter final judgment in their favor. The additional allowance was made under section 3253 of the Code. It is not contended that this is not a difficult and extraordinary case, but it is insisted that the granting of the allowance was premature.

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We are of opinion that this objection was well taken. The Code contemplates but one allowance, and that only upon final judgment. None can be granted upon an interlocutory judgment sustaining a demurrer with leave to amend, which is the judgment rendered in this case. An additional allowance, after it is properly granted, becomes a part of the costs of the action which the successful party is entitled to recover, and if such allowance be granted upon sustaining or overruling a demurrer where leave is given to amend on payment of costs, the unsuccessful party on the demurrer may be compelled to pay as a condition of leave to answer, an additional allowance in a case where final judgment may ultimately be rendered in his favor. We are satisfied that this result was not in contemplation of the Code. There cannot be two extra allowances granted in the same case, although the case may have been tried several times (*Flynn et al., as Administrators, agt. Equitable Life Ins. Co.*, 13 *Hun*, 212).

The superior court, in *McNicol agt. The Mayor* (14 *J. & S.*, 53, 63), laid down the correct rule in these words: "The test must be that the action has terminated in such form that the successful party can lawfully claim the payment of the costs on such termination and enforce their payment."

An additional allowance cannot, therefore, be granted upon sustaining or overruling a demurrer, with leave to answer over on payment of costs, but only, if at all, when the final judgment is pronounced that unconditionally terminates the action and fixes the right of the successful party to tax his costs absolutely under the Code.

The order should therefore be reversed, without prejudice to a renewal of the application whenever the defendants became entitled to apply for final judgment in the action, with ten dollars costs of this appeal besides disbursements.

BRADY and DANIELS, JJ., concur.

Davis agt. Herrig.

SUPREME COURT.

ELIZABETH DAVIS agt. PHILIP HERRIG and others.

Supplementary proceedings — Judgment for costs only — When order to examine debtor of judgment debtor will be granted — Code of Civil Procedure, sections 2441, 2458.

Proceedings supplementary to an execution may be taken upon a judgment for *costs only*, rendered against a plaintiff. Appearance is predicable of every party to an action who submits himself to the jurisdiction of the court, whether plaintiff or defendant, and plaintiff's appearance in the action is complete when a summons in proper form, signed by himself or his attorney, has been served upon the defendant.

An affidavit which states that H. was indebted to the judgment debtor in a sum exceeding ten dollars, to wit, \$100, is sufficient to give the judge jurisdiction to grant an order to examine a person having property of a judgment debtor. A man is indebted equally whether his debt is due or to become due.

Syracuse Special Term, June, 1883.

MOTION to vacate order for examination of person indebted to judgment debtor.

E. J. Richardson, for motion.

J. S. Baker, opposed.

CHURCHILL, J.— February 5, 1883, the defendant, John E. Jones, recovered judgment against the plaintiff for \$127.47 for costs. Execution against the property of the plaintiff was issued June 6, 1883, which yet remains in the hands of the sheriff unsatisfied. Upon an affidavit of the judgment creditors that one Joseph Hofert was indebted to the plaintiff "in a sum exceeding ten dollars for rent, to wit, in the sum of \$100," the special county judge of Oneida county granted an order, under section 2441 of the Code of Civil Procedure, for the examination of Joseph Hofert. The motion to vacate this order is made upon two grounds.

First. That appearance is predicable only of a defendant,

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and that therefore, under section 2458 of the Code, proceedings supplementary to an execution cannot be taken upon a judgment for *costs only*, rendered against a plaintiff.

Second. That the affidavit of the judgment creditors showed that nothing was actually due from Hofert to the plaintiff, but only that something would become due at a future day.

The first ground of the motion is untenable. Appearance is predicable of every party to an action who submits himself to the jurisdiction of the court, whether plaintiff or defendant. The plaintiff does this by commencing his action ; the defendant, by voluntarily submitting himself to the jurisdiction of the court after the action is commenced. Formerly such appearance, both by the plaintiff and defendant, was made in proper person ; afterwards by attorney (3 *Blackstone*, 25 ; 12 *Howard*, 176, 182). Under the Code of Civil Procedure (*sec.* 25) the plaintiff must appear in person or by attorney, and cannot afterwards appear and act in person, and his appearance in the action is complete when a summons in proper form, signed by himself or his attorney, has been served upon the defendant (*Sec.* 416).

I think the second ground is also untenable. The last part of the affidavit, on which the order was granted, stated positively, substantially in the words of the statute, that Hofert was indebted to the plaintiff in a sum exceeding ten dollars, to wit, \$100, and that, in this department, has been held sufficient to give the officer jurisdiction to grant the order (*First Nat. Bank agt. Wilson*, 5 *Week. Dig.*, 565). But taken in connection with other parts of the affidavit, I think it fairly appears that the only indebtedness of Hofert to the plaintiff was upon the lease of a farm in which plaintiff had a life interest and of which Hofert was tenant, upon which lease \$100 would become due July 1, 1883. As the affidavit and order were made June 27, 1883, nothing was due from Hofert to the plaintiff at that time and so the point made by plaintiff's counsel fairly arises upon the papers. But a man is *indebted* equally, whether his debt is due or to become due,

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and the fact, therefore, the existence of which must be shown before the debtor of a judgment debtor can be examined, appears sufficiently from this affidavit.

The motion therefore is denied, with ten dollars costs.

SUPREME COURT.

JOSEPH L. SCOFIELD and another, as executors, &c., agt. LEWIS M. ST. JOHN and others.

Legacy to executors in addition to commission — Death of executor before probate of will — Claim to legacy by his representatives, when allowed.

The testatrix, by her will, gave \$1,000 to each of her executors, "in addition to the commissions or allowances they would be entitled to by law," as such executors. After the will had been offered for probate, but before it was actually proved, one of the executors named therein died. *Held*, that the deceased executor having accepted the trust and performed acts which showed an intention to assume all the responsibilities and duties of the office, it is sufficient to entitle his representatives to the legacy, although they might not have a legal claim for commissions.

The testatrix directed that \$8,000 be applied in the purchase of a house and lot in the city of New York, the use of which she gave to her housekeeper during life, and on her death the house to go to the niece of testatrix.

Held, that the clause is valid, and not void as being a naked and inactive trust, as, if the duties imposed are in the nature of a trust, they are not wholly inactive.

Special Term, June, 1882.

F. G. McDonald, for plaintiff.

A. K. Wagner, for defendant Clarke.

James O. Clarke, for administrator of deceased.

Henry Parsons, for residuary legatees.

VAN VORST, J. — By her last will and testament, the testatrix, Louisiana St. John, gave to each of the executors

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thereof, the sum of \$1,000 "in addition to the commission or allowances they would be entitled to by law" as such executors. The testatrix died on the 22d day of July, 1879, but her will was not admitted to probate until the 17th day of March, 1880. After the will had been offered for probate, but before it was actually proven, Harvey A. Sackett, one of the executors named therein, died, and a claim is now made by the representative of his estate for the payment of this legacy of \$1,000 given to each executor. This is objected to by the residuary legatees.

Cases with facts somewhat kindred to the above have frequently arisen, and sometimes the claim on behalf of the representatives of a deceased executor have been sustained, and at other times rejected. There is, in fact, an apparent conflict in the cases.

It is said in *Roper on Legacies*, 780, "that if executors die before taking on themselves the trust, the condition upon which the legacies are given not being performed, they cannot be claimed." And in *Williams on Executors*, 1394, it is said, "if the legatee prove the will with an intention to act under it, that will be a sufficient performance of the condition, or if he unequivocally manifest an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition." The latter view is clearly sustained by the case of *Harrison agt. Rowley* (4 Vesey, 215).

In re Hawkins' Trust (33 Beav., 570), where the bequest to the executor was "for his trouble," it was held not to be payable, the executor having been prevented by severe illness from proving the will, and from ever acting.

The cases in which gifts to executors have been upheld although they have not acted as such, rest upon the ground that the gifts were not made to them strictly as such, or conditionally. Thus *In re Derby* (3 D. F. & J., 350) where the legacy was "to my friend T. S. of M., banker's clerk, and one

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of the executors of this my will," the gift was held to be unconditional (*Burgess* agt. *Burgess*, 1 *Coll.*, 367; *Bubb* agt. *Yelverton*, 13 *L. R.*, 131). But where the gift is made to the executors strictly as such, and they manifest no intention to act, and in fact omit wholly to act or renounce, they cannot take the gift (*Calvert* agt. *Sabbon*, 4 *Beav.*, 222; *Morris* agt. *Kent*, 2 *Edw.*, 175; *Redfield on Wills* [2d ed.], 561).

In *Slanery* agt. *Watney* (2 *Eq. L. R.*, 418) one of the executors never in any manner acted in the execution of the will, and the court held that "the bequest was clearly annexed to the office, and therefore the executor and trustee who never acted is not entitled."

In *Lewis* agt. *Matthews* (8 *Eq. L. R.*, 277) an executor to whom a legacy was left "for his trouble," being in Australia at the death of the testator, sent a power of attorney under which another person administered the estate, the executor died without proving the will. It was held that the executor had sufficiently shown his intention to act under the trusts of the will to entitle his representatives to the legacy, and that "it was not absolutely necessary to prove a will to entitle a person to a legacy as executor."

I think I have sufficiently noticed the cases upon this subject to indicate the principle by which they are controlled. The disposition of the court is to uphold the gift, when it can be plainly seen that the legacy was not made to the executor strictly as such, though he has not acted or shown a disposition to do so. And in the cases where the gift was not absolute, but conditional, to uphold the same, if the executor has manifested an unequivocal intention to act, and has done all that he could in the direction of accepting the office and the trusts, and has been prevented by death from fully clothing himself with all the power needed through an actual probate of the will.

An executor can legally perform certain acts in his office as such before probate of the will. He can present the will for probate; he can provide for the expenses of the funeral

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of the testator ; he may take needed steps for the preservation of the property (3 *Red. on Wills* [3d ed.], 21).

In the case before us the executor showed a clear intention to fully accept the office. He was present at the funeral, and accompanied the remains from New York city to the place of burial in the western part of the state. He informed himself of the nature of the trusts by an examination of the will and making a copy thereof. Immediately after the funeral he proceeded to an examination into the condition of the property of the estate, and conferred with the other executors in respect thereto. He joined in offering the will for probate in the surrogate's court, and when objections were made he conferred with the other executors in respect to the selection of a proper person as receiver during the pendency of the proceedings while the objections were under consideration. He changed his business matters to give attention to the will and its purposes. He made efforts to secure a withdrawal of the objections, so that the will might be proved, and expressed a determination to accept the office and the trusts. He incurred expense and loss of time in going from his residence in New Jersey to the city of New York, on several occasions, in respect to the estate and in virtue of his appointment as executor under the will.

There is not the shadow of a doubt but that he intended to qualify, and that but for the delay in the probate he would, before his death, have taken every step needed to exercise the office fully. Nor is there any doubt but that he was acting until his death as best he could under the trusts of the will.

And in order to entitle his representatives to take this legacy the deceased executor, under the facts, must be considered to have done all that in good faith he intended to do in the direction of fully accepting the trusts.

It is urged, however, that the legacies could only be taken by such of the executors as were entitled to legal commissions, and that a failure to earn the commissions would of itself disentitle the person so failing to the legacy.

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I am not prepared to place so narrow a construction upon this legacy. The gift is independent of the commission and in addition thereto. It does not necessarily follow that the condition to receiving the legacy is a lawful claim to commissions. But otherwise I conclude that an acceptance of the trust, and the performance of acts which clearly show an intention to assume all the responsibilities and duties of the office, would be sufficient to entitle the representatives of the deceased executor to the legacy, although they might not have a legal claim for commission.

Objections are also made by the residuary legatees to the following clause of the will:

“Four or eight thousand dollars to be applied in the purchase of a house and lot in the city of New York, the use of which I give and bequeath unto my said housekeeper, Mrs. Sophia Clarke, for and during the term of her natural life, provided that she reconvey to my executors a certain lot of land situate at Yonkers, Westchester county, N. Y., which I have heretofore conveyed to her; and on the death of said Sophia Clarke, the said house, so used by her, is to go and be conveyed to my niece Olive St. John, absolutely and forever.”

It is argued that this clause creates trusts not allowed by law. That it is a naked and inactive trust, and that the whole provision is absolutely void.

I cannot adopt that conclusion. It may well be that the testatrix could have accomplished her good intentions towards her housekeeper in a simpler way, but for that reason the gift should not fail. Had she purchased a dwelling-house in her lifetime, suitable as a residence for her housekeeper, she could clearly, by her will, have given to her the use of it for life; and I fail to see why she cannot empower her executors to apply her means, to the extent indicated, in the purchase of a dwelling to be used by the beneficiary for life.

If the duties imposed are in the nature of a trust, they are not wholly inactive. The property purchased must be pre-

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served that the gift over should not fail. And everything to that end must be accomplished by the executors. Before the beneficiary can enjoy the gift, the executors must secure and hold for the estate the property, the conveyance of which is made as a condition to the use and enjoyment of the dwelling house by Mrs. Clarke.

The testatrix could have directed the investment of the amount named in bonds or other security for the use of the beneficiary for life. That the direction is for a more secure investment in land for the same purpose, cannot be radically defective.

In *White agt. Howard* (46 *N. Y.*, 144), the executors were directed to invest moneys of the testator in lands in the state of New York; but although many objections were made in that case, none seems to have been interposed on that account.

In *Leggett agt. Perkins* (2 *N. Y.*, 297), the executors were authorized to invest in real estate for the use of the daughter of the testator, and the authority was sustained (*Leggett agt. Hunter*, 19 *N. Y.*, 457).

In the leading case of *Hawley agt. James* (16 *Wend.*, 269), to which my attention is called, the whole trust was adjudged to be void. As a matter of course the power to invest in land fell with the trust, which for other reasons was invalid in its inception.

I am of opinion that the clause of the will in question is valid, and should be carried out as the testatrix has directed, and that a sum not exceeding \$8,000 should be used for the purchase of the dwelling-house and lot, to be used by Mrs. Clarke for life, and after her death it will go to Olive St. John in fee.

Findings of fact and conclusions of law, with a decree, should be prepared by the plaintiffs' attorneys, and served upon the attorneys for the other parties, with a notice of settlement before me of two days.

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SUPREME COURT.

EDWARD LYKE agt. RENSSELAER POST and others.

Pleading — When not indefinite or uncertain — When motion at special term requiring an answer to be made more definite and certain will be denied — Election of causes of action.

In an action brought for the foreclosure of a purchase-money mortgage, the defendant alleged in his answer fraud and deceit in the sale to him of the premises in question concerning the lien of a judgment affecting said premises, and demanded judgment for a cancellation of said mortgage, and a recovery by him of the amount paid thereon; or that the amount of the judgment be deducted from the amount of the mortgage.

On a motion to have the answer made more definite and certain:

Held, that the motion should be denied. That a suggestion to the court of the various reliefs to which a party may be entitled upon his facts does not make the pleading either indefinite or uncertain. (*This is adverse to Huulka agt. Kamp*, 40 Superior Ct. Rep., 70.)

Kingston Special Term, November, 1882.

THE action was brought for the foreclosure of a purchase-money mortgage. The defendant Rensselaer Post, in his answer, alleged fraud and deceit in the sale to him of the premises in question, concerning the lien of a judgment affecting said premises, and demanded judgment for a cancellation of said mortgage and a recovery by him of the amount paid thereon, or that the amount of the judgment be deducted from the amount of the mortgage. The plaintiff moved at special term for an order requiring "the answer herein to be made more definite and certain, that is to say, that the defendant Rensselaer Post be required to allege in his said answer by apt and proper allegations, so that it shall clearly appear whether the said defendant elects to rescind and hold void the said purchase of real property, concerning which his said answer relates, or whether he elects to affirm the said purchase and seek to recoup, set-off or counter-claim against the

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sum due and owing upon the said bond and mortgage the amount of his alleged damages by reason of the alleged false and fraudulent representations, as set forth in his said answer.”

R. V. W. Du Bois, for plaintiff.

Harver & Cochrane, for defendant.

WESTBROOK, *J.*— This motion has the authority of *Faulke* agt. *Kamp* (40 *Superior Ct. Rep.*, 70) to make it. I cannot, however, follow that case. The defendant does not set up two defenses and jumble them together. He spreads before the court all the facts, and submits to the court the question of relief, whether it shall be a cancellation of the mortgage and a return of his money with interest, or a credit upon and deduction from the mortgage of the amount due upon the judgment. This makes the defense no more uncertain than the prayer for relief in the complaint in an equitable action, when the plaintiff, after claiming specific relief, also asks for such other or further relief as he may be entitled to. A suggestion to the court of the various reliefs to which a party may be entitled upon his facts does not make the pleading either indefinite or uncertain.

Motion denied, without costs, as plaintiff has the authority of a reported case to make it.

Van Voorhis agt. Kelly *et al.*

SUPREME COURT.

CORNELIUS W. VAN VOORHIS, grantor of CHARLES FREEMONT
WILLIS, agt. JOSEPH J. KELLY *et al.*

Obstruction to title — Grantee of lands held adversely may maintain action in name of grantor — Execution — When leave to issue must be obtained.

A deed of lands held in adverse possession, is void as against the party in possession, and an action will lie against him in the name of the grantor notwithstanding such deed.

Under section 284 of the Code of Procedure, an execution issued after the lapse of five years from the entry of judgment, without leave of the court, is irregular, and should be vacated. The law supposes the judgment to be unpaid for five years. After that time it presumes payment, and requires the plaintiff to show by proof that the judgment, either in whole or in part, is still unpaid.

Special Term, May, 1883.

It appears that on June 8, 1836, Cornelius W. Van Voorhis, the plaintiff, was seized and possessed in fee of two certain lots of land in the city of New York, on the east side of Fifth avenue, commencing twenty-five feet two inches south of Ninetieth street, and being each twenty-five feet two inches wide, front and rear, and 102 feet two inches in depth.

On April 1, 1851, Ellis S. Mills, as executrix, recovered a judgment in the marine court of the city of New York, against Van Voorhis, for fifty-seven dollars and forty-three cents, a transcript of which was filed in the office of the clerk of said city and county, August 2, 1851.

About the year 1858, Elizabeth Tinker, who owned an adjoining lot, took possession, as the defendants insist, of the premises in question, inclosed the same, and subsequently paid the taxes and assessments imposed thereon and claimed to hold the same adversely to the plaintiff. She also obtained an assignment of the Mills judgment, and on August 30, 1867, issued an execution thereon, out of the court of common pleas of the said city and county, whereby all the right,

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title and interest which Van Voorhis had in said premises on the 2d day of August 1851, was sold. This execution, though required to be returned within sixty days after its receipt by the sheriff to the clerk of the court from which it was issued, was not in reality returned or filed until December 7, 1880.

In the meantime a sale was made, under the execution, of Van Voorhis' interest in the premises, and the same was conveyed to Elizabeth Tinker by the sheriff, by deed dated January 22, 1869.

On April 20, 1881, Van Voorhis conveyed the premises to Charles Freemont Willis, and this action is brought against the heirs-at-law and devisees of Elizabeth Tinker, in pursuance of section 1501 of the Code of Civil Procedure, to set aside all proceedings under the execution and sale, to recover possession of the property and for an accounting.

Wheeler H. Peckham and *William Settle*, for plaintiff.

Theron G. Strong and *John Townsend*, for defendants.

LARREMORE, J. — As to plaintiff's right to maintain this action, I must follow the decision of the learned justice who overruled the demurrer interposed to the complaint, and hold that the suit is well brought in the name of Van Voorhis (*Hamilton agt. Wright*, 37 N. Y., 502; *Lowber agt. Kelly*, 9 Bosw., 494).

The only equitable relief that the plaintiff can ask on this trial is the setting aside of the proceedings and sale under the Mills judgment. The ultimate recovery of the land in dispute must be had under the rules and practice governing an action of ejectment, and upon that issue the defendants are entitled to a trial by jury.

It is, therefore, only necessary to consider that branch of the case which is properly cognizable by a court of equity — viz., the alleged fraudulent proceedings under the judgment referred to, as an obstruction to plaintiff's title.

An attempt was made to show that an execution had been

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issued from the marine court upon this judgment within five years from its rendition. There is no record evidence of this fact, and the oral testimony offered is both unsatisfactory and unreliable. But if it were true it fails to meet the requirements of section 284 of the Code of Procedure, which contemplates that such an execution should be issued in conformity with the practice of the court from which leave to issue the same upon such judgment might have been granted.

On August 2, 1851, it became a judgment of the court of common pleas of the city and county of New York for the purpose of enforcement.

On August 30, 1867, an execution was issued upon it without leave of that court or knowledge of the judgment debtor whereby his title is sought to be divested.

As a judgment of the marine court it was not a lien upon the real estate of the plaintiff. As a judgment of the court of common pleas it was subjected to its rules and practice. Without leave of that court, as above stated, an execution was issued upon it and proceedings had which resulted in the sale under which Mrs. Tinker and her devisees claim title. She knew that Van Voorhis was the owner of the record title to the premises, and her attorney testified that the execution sale was to make a title to the lots. Is such a transaction consistent with good faith and fair dealing?

It was held by judge INGRAHAM, in *Field agt. Paulding* (3 *Abb. Pr.*, 139), that under section 284 of the Code of Procedure an execution issued after a lapse of five years from the entry of a judgment, without leave of the court, was irregular and should be vacated; that "the law supposes the judgment to be unpaid for five years. After that time it presumes payment and requires the plaintiff to show by proof that the judgment either in whole or in part is still unpaid."

Granting that a sale under such an execution was voidable only (*Wallace agt. Swinton*, 64 *N. Y.*, 193) the question of laches appears to be evenly divided between a judgment debtor, without notice of the execution and sale, and a judg-

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ment creditor and her assignee who slept upon her rights for sixteen years and then sought to enforce a specific lien against the debtor's property.

In this connection the gross inadequacy of value becomes important, and coupled with the motive that induced the sale establishes a presumption of constructive fraud.

Van Voorhis testified that at the time such execution was issued he had sufficient personal property to satisfy the judgment. His interest in the premises, at that time variously estimated from \$17,000 to \$25,000, was sold for \$150. The execution was not returned or filed until more than thirteen years after it was issued.

Under all the circumstances disclosed by the evidence the plaintiff cannot be convicted of laches and he is entitled to judgment setting aside the execution and sale, but issues must be settled and tried by a jury as to the possessory title claimed by the defendants, and if that is found in plaintiff's favor an accounting may then be had as to the moneys due for use and occupation and the payments made for taxes and assessments.

As the plaintiff is entitled to some equitable relief the action must be retained for that purpose (*Sternberger* agt. *McGovern*, 56 N. Y., 12).

When the question of the title by possession is disposed of this court will finally adjudicate upon the rights and interests of the parties.

SUPREME COURT.

JOHN ROACH and others, respondents, agt. ISAAC F. DUCKWORTH, appellant.

Creditors' action against trustee of manufacturing corporation — When enforcement of judgment will be restrained.

A loan of \$6,000 was made by A. to B., as president of a corporation, B. giving as collateral security \$6,000 of the corporation's bonds, of which he was the owner. The indebtedness was not paid, and A. caused the bonds to be sold at auction. They were purchased by one C. for the

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nominal sum of \$640, in the interest of and for A., the seller of the bonds. A judgment was recovered by C. against R., who was trustee of the corporation, for the amount of the bonds, upon the ground that the trustees had failed to comply with the statutory requirement as to filing annual reports. C., without the knowledge of A., satisfied the judgment and it was discharged of record. A motion to set aside the satisfaction because A. was the real owner of the judgment, was denied. A. then, in a suit in his own name against R. and the other trustees for the same defaults in filing annual reports, recovered a judgment for the loan to the corporation. The fact that A. sued in C.'s name, and that both claims belonged in fact to A., were unknown to R. and his co-trustees until long after both judgments were obtained. R. then brought this action to enjoin A. from enforcing his judgment.

Held, that the action sought to be enjoined being clearly an attempt to recover the same penalty twice by a course of proceeding altogether indefensible in equity and morals, the court below was entirely justified in holding the defendant strictly to consequences that followed on the recovery of the first judgment and compromise and discharge thereof by the accomplice of the defendant in the wrongful scheme to extort the double penalty (*Affirming S. C.*, 61 *How.*, 128).

First Department, General Term, May, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Hatch & Van Allen, for appellant.

George W. Van Siclen, for respondent.

DAVIS, P. J.—This appeal is from a judgment perpetually enjoining the collection of a judgment of the court of common pleas, for a recovery of damages and costs, and two judgments for costs on appeal to the general term of that court and to the court of appeals. The judgment in this case rests substantially upon the fact that a prior judgment had been recovered against the present plaintiffs in the name of another person, but really for and on behalf of the present defendant for the same cause of action, which prior judgment if the facts had been known could have been pleaded in bar to the recovery of the judgment the collection of which is now sought to be enjoined; and which judgment was after-

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wards satisfied and discharged by the party in whose name it had been recovered. It is manifest that both actions were attempts by the defendants to enforce a penalty against the plaintiff Roach for the default of a corporation of which he was a trustee, in neglecting to make and file its report as required by statute. The corporation was indebted for borrowed money to the amount of \$6,000 and interest; and in the form detailed in the opinion of the court below, a scheme was devised by which it was attempted (successfully so far as the recovery of the judgments was concerned) to collect of the defendant Roach double the amount of the loan to the corporation. The success of the scheme was defeated by the conduct of an attorney's clerk, in whose name, as owner, the first suit was commenced, in which a judgment was recovered and afterwards compromised and settled in fraud of defendant (as it is claimed by him).

Both actions being for a penalty given by a statute, and the one now sought to be enjoined being clearly an attempt to recover such penalty twice by a course of proceeding altogether indefensible in equity and morals, the court below was entirely justified not only in enforcing the rules *strictissimi juris*, which the law applies to that class of actions, but in holding the defendant, upon the facts proved and found, strictly to the consequences that followed on the recovery of the first judgment and the compromise and discharge thereof by the accomplice of the defendant in the wrongful scheme to extort the double penalty.

If the cause of action for which the duplicate judgments were recovered had been an indebtedness of the plaintiffs in this suit it would, doubtless, be strictly equitable to require the payment of the amount actually owing and not paid as a condition of relief from the judgment sought to be restrained. But the plaintiffs owed no debt. The claim against them was a penalty for neglect of duty, as is now settled by the court of last resort. It is not inequitable, therefore, that the defendant should be held to the consequences adjudged to him by

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the special term. The case is disposed of in accordance with and upon the grounds assigned by VAN VORST, J., in *his* opinion in 61 *Howard*, 128, which we adopt as indicating more fully the grounds of our decision.

There seems to have been no errors affecting any substantial rights committed by the learned justice in the progress of the trial.

The judgment is therefore affirmed, with costs.

BRADY, J., concurs.

SUPREME COURT.

LUELLA CHASE, respondent, agt. JOHN C. CHASE, appellant.

Attorney—Action by wife against husband for separation—Settlement by parties—Claim for counsel fee by attorney for wife, how enforced against husband—Costs.

In an action by wife for a separation from her husband for cruel and inhuman treatment, after issue had been joined the wife returned to live with her husband, and the plaintiff's attorney, in the name and behalf of the wife, made a motion for an order compelling the defendant to pay the attorney for plaintiff a counsel fee for his services in the action:

Held, that the attorney had mistaken his remedy. Before the settlement can be set aside or treated as fraudulent, some good reason therefor must be shown, and the plaintiff herself is entitled to notice of any application for such purpose:

Held, further, that if the attorney as such has any claim for counsel fees or costs upon the defendant, he must, in his own behalf, notice his motion or bring his action to enforce such claim.

When no costs are asked for in the notice of motion none should be allowed.

Fourth Department, General Term, April, 1883.

Before SMITH, P. J., HARDIN and BARKER, JJ.

APPEAL from an order of Oneida special term, allowing twenty-five dollars as counsel fee and ten dollars costs of motion.

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E. W. Risley and *A. C. Woodruff*, for appellant.

D. E. Powers, for respondent.

HARDIN, *J.*—This action was brought by the wife for a separation from her husband, upon the ground of alleged cruel and inhuman treatment. An answer was served September 29, 1882. On the 15th of October, 1882, the wife returned to live with her husband, and has since continued to live with him as his wife. October 16, 1882, the plaintiff's attorney, in the name and behalf of the wife, noticed a motion "for an order allowing the plaintiff's attorney a counsel fee for his services in the aforesaid action." On the 24th of October, 1882, the motion at Oneida special term was heard, and an order was granted "that defendant pay plaintiff's attorney a counsel fee of twenty-five dollars, and ten dollars costs of motion, in all the sum of thirty-five dollars," and then after ten days process issue for the collection thereof, if not paid in that time by defendant.

Defendant appeals from the order. The attorney has mistaken his remedy. The settlement by the parties is not shown to be in bad faith, with intent to defraud the attorney. Such settlements are favored by the policy of the law.

Before the settlement can be set aside or treated as fraudulent, some good reason therefor as between the parties must be shown, and the plaintiff herself is entitled to notice of any application for such purpose (*Dimick* agt. *Cooley*, 16 *Weekly Dig.*, 115; *Murray* agt. *Jibson*, 22 *Hun*, 386). "So far as she is concerned it is a bar to her further prosecuting the action or suing again for the same cause whatever remedy the attorneys may be entitled to in their own behalf" (*Opinion of Smith*, p. 388; see, also, *Jenkins* agt. *Adams*, 22 *Hun*, 600; *Gaddard* agt. *Trenbath*, 24 *Hun*, 183).

If the attorney, as such, has any claim for counsel fees or costs upon the defendant, he must in his own behalf notice his motion or bring his action to enforce such claim. Besides there is no proof that the wife is not able pecuniarily to satisfy

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any liability she may have incurred by reason of her employment of the attorney. No costs should have been allowed in the order as they were not asked for in the notice of motion.

Order reversed, without costs.

SMITH, P. J., and BARKER, J., concurred.

SUPREME COURT.

LUELLA CHASE agt. JOHN C. CHASE.

Husband and wife — Attorney — When and how attorney for wife in action against her husband may, after settlement, compel the husband to pay him for services rendered the wife in the action — Practice.

An attorney for a wife, in an action against her husband, can, by order of the court in the action after settlement by the parties, compel the husband to pay him for services rendered to the wife up to the time of such settlement.

Syracuse Special Term, June, 1883.

AFTER the decision by the general term in this case (*see ante*, 306) the attorney for the wife, upon the following papers, gave notice of motion as follows :

To A. C. WOODRUFF, Esq., *attorney for the above named defendant, and to LUELLA CHASE, plaintiff, and JOHN C. CHASE, defendant :*

Please take notice that upon the affidavit of Melissa Finch, Jane M. Downs, John C. Chase and Michael H. Powers, with copies whereof you are herewith served, and upon the pleadings and all the proceedings herein, a motion will be made at a special term of this court, appointed to be held at the courthouse in the city of Syracuse on the 2d day of June, 1883, at the opening of court on that day, or as soon thereafter as counsel can be heard, for a rule or order of this court requiring the defendant John C. Chase to pay said M. H. Powers

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a reasonable compensation for such services as he has rendered to the plaintiff in this action as set out in the affidavit of said M. H. Powers, together with the costs of this motion.

This motion is made by said M. H. Powers in his own behalf and interest and with a view to enforce his own rights.

Yours, &c.,

M. H. POWERS.

OLNEY & POWERS,

Attorneys for M. H. Powers.

ONEIDA COUNTY, ss.:

Michael H. Powers, being duly sworn, says that he is an attorney and counselor-at-law, and is and has been for the last two years past engaged in the practice of his profession at Florence, Oneida county, New York; that the parties to this action are husband and wife, and have been thus related since the 1st day of February, 1881, since which time they have resided within the county of Oneida; that on or about the 13th day of September, 1882, he was retained by the plaintiff, who is the wife of defendant, to commence an action as above entitled in her behalf against the defendant, who is her husband, for a separation from her said husband on the ground of his cruel and inhuman treatment towards her; that deponent made a careful investigation of the relations which then existed between the parties and became satisfied from the statements made to him by the plaintiff, her father and other parties, that the relations which existed between the parties were such as not only to justify but require the plaintiff, for her protection and support, to institute an action of this character against her said husband; that acting on the belief that the plaintiff had a good and meritorious cause of action for a separation from the defendant, and at the request of the plaintiff this deponent, as her attorney, instituted an action as above entitled on the 15th day of September, 1882, by the service of the summons and complaint herein upon the defendant; that the defendant appeared by A. C. Woodruff, Esq., as his

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attorney, and served an answer herein upon deponent on the 29th day of September, 1882; that on the 14th day of October, 1882, deponent procured the affidavits of Jane M. Downs and Melissa Finch, copies of which are hereto annexed, who reside at Florence aforesaid, on behalf of the said Luella Chase, to move for alimony and counsel fees herein *pendente lite*; that thereafter and on the 15th day of October, 1882, the said plaintiff returned to the bed and board of the defendant and abandoned her said action against him for a separation, and has since then lived and cohabited with the defendant as his wife. Deponent thereafter, and at a special term of this court, moved on behalf of the plaintiff, upon notice to the defendant, for an allowance for his services in behalf of the plaintiff out of the husband's estate. At a special term of this court held at Utica, New York, on the 24th day of October, 1882, at which Hon. IRVING G. VANN presided, an order was made by said justice at said term allowing the plaintiff's attorney twenty-five dollars for such services as he had rendered in the action to the said plaintiff prior to that time, and ten dollars costs of motion. Which order provided that the same should be paid by the husband; that an appeal was taken from said order to the general term of the fourth department, where it was reversed by said general term upon the ground, among others, that said motion should not have been made in the name and in behalf of the wife; that deponent procured Olney & Powers to act as his counsel herein, and make printed points and argue said appeal at the general term; that the services deponent had rendered to the plaintiff in the action prior to the time said appeal was taken were worth the sum of thirty dollars; that the services of deponent and his counsel in arguing the appeal from said order were worth the sum of thirty dollars; that the disbursements incurred by deponent in this action amount in all to the sum of six dollars and sixty cents, and no part of same has ever been paid; that deponent has acted in entire good faith as the attorney for the plaintiff; that the plaintiff has no separate

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property, nor any means whatever, of paying deponent for the services he performed, and procured to be performed, for her in the premises; that as deponent is informed and believes the defendant is worth the sum of \$1,000, and has a trade out of which he realizes \$400 per year; that since said 15th day of October, 1882, the plaintiff and defendant have cohabited together as husband and wife, but that up to the 15th day of October, 1882, deponent verily believes that the plaintiff acted in good faith and with honest intentions in bringing and prosecuting this action. Deponent further says that the defendant, as appears by an affidavit made by him before E. C. Woodruff, a notary public, October 23, 1882, well knew at the time his wife returned to his bed and board as aforesaid that this deponent had not been paid for the services he had rendered to the plaintiff herein; that no discontinuance of the action has been signed by the parties or their attorneys, and that the same is now pending and undetermined.

MICHAEL H. POWERS.

Subscribed and sworn to before }
me, May 19, 1883. }

T. C. EVANS,
Justice of the Peace.

ONEIDA COUNTY, ss.:

Jane M. Downs, of the village of Florence, in said county, being duly sworn, deposes and says that she is well acquainted with, and has since the marriage of the above named plaintiff and defendant lived and resided near them in the village of Florence aforesaid; that deponent has frequently heard defendant use hard, angry and threatening words to plaintiff since their residence near her as aforesaid; that on the 7th day of July, 1882, and when the infant child of plaintiff and defendant was only two weeks and four days old, deponent saw defendant push plaintiff out the front wing door of their, plaintiff's and defendant's, house in Florence village aforesaid,

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and heard defendant tell the said plaintiff (his wife) to leave their said house, and if she did leave it she never should come back. Deponent further swears: I then went over to their house and talked with defendant and tried to have him let the said plaintiff come back and to pacify him as it was raining and not fit for plaintiff to be out. Defendant then told deponent he could not live with her, plaintiff, and that he would not live with her. Deponent further says that the plaintiff was compelled to leave her said house and go up to her father's (B. A. Renfield's) house in the rain; that the said defendant was intoxicated at the time and seemed to be greatly angered and enraged.

JANE M. DOWNS.

Sworn to before me on this 14th }
day of October, 1882. }

D. G. GRAVES,

Notary Public in and for said county.

ONEIDA COUNTY, ss.:

Melissa Finch, of the village of Florence, in said county, being duly sworn, deposes and says that she is well acquainted with the said plaintiff and defendant above named; that deponent, in the year 1881, lived next house to the said plaintiff and defendant, in the village of Florence, and only two or three rods apart; that deponent well remembers the occasion referred to in plaintiff's complaint regarding the defendant's compelling the said plaintiff to undress by means of a knife; that the said plaintiff came to the house of deponent on the occasion mentioned in great haste and terribly frightened, saying: "He (meaning defendant) is crazy;" "he is crazy;" that plaintiff's clothing was off, although it was not bed time; that plaintiff was greatly afraid of defendant, and claimed that defendant threatened to use a knife upon her, "that he was thirsting for her blood," &c.; that plaintiff remained at the house of deponent all night through fear, as she claimed, of her life, because of the violence of her said

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husband, the defendant herein; that the said defendant is at times very intemperate.

MELISSA FINCH.

Sworn to before me on this 14th }
day of October, 1882. }

D. G. GRAVES,

Notary Public in and for said county.

ONEIDA COUNTY, ss. :

Michael H. Powers, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above action; that the same is an action for a separation between the above named plaintiff and defendant, who are husband and wife; that deponent was retained by the plaintiff to bring said action after having fully explained the nature thereof to plaintiff in the hearing and presence of her father (B. A. Renfield); that on the 14th day of October, 1882, the said plaintiff requested the said deponent to go to different witnesses in the village of Florence for the purpose of obtaining their affidavits to be used on a motion for alimony and counsel fees herein; but that on the 15th day of October, 1882, the said plaintiff returned to the house of defendant, and as deponent is informed and believes with the intent of again living and cohabiting with the said defendant and as his wife, and with the intent, as deponent believes, of cheating and defrauding this deponent out of any pay for his services herein; and deponent is informed and he believes that the said plaintiff and defendant have colluded together with the like intent, to wit, to defraud this deponent out of pay for his services aforesaid, deponent therefore prays that an order be made herein compelling the said defendant to pay him his counsel fees to date, and for such other order as to the court it may seem right to grant.

M. H. POWERS.

Sworn to before me on this 16th }
day of October, 1882. }

T. C. EVANS, *Justice of the Peace.*

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ONEIDA COUNTY, ss. :

John C. Chase, being duly sworn, says he is the defendant in the above entitled action; that the said action was brought to obtain a decree of separation and for separate maintenance on the ground of alleged cruel and inhuman treatment. Deponent made answer to the complaint and duly verified the same, and a copy was served on the 29th day of September, 1882, in and by which said answer he denies all the material allegations of the complaint and avers, in substance, that the said plaintiff was induced to leave him and to commence this action through the influence of her father, and that after the commencement of this action, and before issue was joined therein, the said plaintiff had attempted to return to him but was prevented by her said father; that after the service of said answer, and on Sunday, the fifteenth instant, the plaintiff spoke to deponent on the street, in the village of Florence, and said she would like to return and live with him; that she acknowledged she had done wrong in leaving and promised that she would do as well as she could if she might return to deponent's house; that she came back to deponent's house voluntarily on said Sunday, and has since continued to reside with him as his wife; that said request was made voluntarily by the plaintiff, and such return was without any solicitation on the part of deponent, and deponent denies that there was any collusion between himself and the plaintiff to defraud the plaintiff's attorney out of the pay for his services in said action. The plaintiff has since asked deponent if he would pay Mr. Powers, her attorney, to which he replied that he would not voluntarily pay him anything. Deponent further says that no settlement of said action, except as hereinbefore stated, has been made, and no discontinuance thereof signed by the parties or their attorneys, and that the same is now pending and undetermined. Deponent further says that he has fully and fairly stated his case in this action to A. C. Woodruff, Esq., his attorney and counsel therein, who resides at Camden, Oneida county, New York, and that he has a

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good and substantial defense to said action upon the merits, as he is advised by his said counsel after such statement made as aforesaid, and verily believes.

JOHN C. CHASE.

Sworn to before me, this 23d }
day of October, 1882. }

E. C. WOODRUFF,
Notary Public.

SUPREME COURT.

LUELLA CHASE <i>against</i> JOHN C. CHASE.
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It is hereby stipulated that this action be and the same is hereby discontinued.

LUELLA CHASE.

Dated at FLORENCE, N. Y., this 10th day of May, 1883.

STATE OF NEW YORK, } ss.:
ONEIDA COUNTY.

On this 11th day of May, 1883, before me personally came Luella Chase, to me known to be the same person described in, and who executed the foregoing instrument, and she acknowledged that she executed the same.

CHESTER M. OSBORN,
Justice of the Peace.

Joseph P. Olney and D. E. Powers, for motion. The general term having decided nothing except that the plaintiff made the original motion after her return to her husband, the question is now before the court for the first time upon its merits, and the only vital question which in our judgment this motion involves is, whether the abandonment of the action by the wife, her attempted discontinuance of the same, has ousted the court of its jurisdiction of the cause. The complaint was

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served and issue had been joined by the service of the defendant's answer before the reconciliation of the parties took place, and before the wife had attempted to stipulate a discontinuance, and as yet there is no final decree dismissing the complaint or in any way making a final disposition of the cause. Upon this condition of the cause we insist that the court has not lost its jurisdiction (*Green* agt. *Green*, 40 *How. Pr.*, 465; *Bishop on Marriage and Divorce* [vol. 2, 6th ed.], sec. 388; *Bass* agt. *Bass*, *New York Monthly Law Bulletin* [vol. 5], page 44; *Graves* agt. *Cole*, 7 *Harris* [Penn.], 171; *Brinkley* agt. *Brinkley*, 50 *N. Y.*, 200; *Griffin* agt. *Griffin*, 47 *N. Y.*, 134). The *Green* case (40 *How.*, 465) was an action for a separation brought by the wife against the husband for a separation from her husband on the ground of cruel treatment, and like the present cause was never tried. It was settled during its pendency by the parties. The settlement was brought about by the overtures of the wife. After the settlement had been perfected the husband moved to dismiss the complaint. The court refused to do so and awarded the wife's attorney \$750 for counsel fee, and held that it had jurisdiction of the cause until after the entry of final decree. This case, therefore, distinctly holds that the court has power to protect and enforce the attorney's rights in an action of this character until after the entry of final decree, notwithstanding a settlement by the parties. It is founded upon that familiar principle of equity which holds that where a court of equity acquires jurisdiction of the parties and subject-matter of the action it will retain that jurisdiction until justice is done all the parties, and on those wholesome maxims which say that the law hateth a multiplicity of suits and favoreth the speeding of men's causes. To oust the court of its jurisdiction two things must concur: the parties must settle, and the settlement must be followed up by final decree dismissing the cause. It was proper for the attorney to notice the motion in his own name and serve the moving papers and notice upon both parties (*Murry* agt. *Gilson*, 22 *Ilun*, 386; *Goddard* agt.

Concord Granite Company agt. French.

Trenbath, 24 *Hun*, 182; *Rooney* agt. *Second Avenue R. R. Co.*, 18 *N. Y.*, 386; *Marshall* agt. *Murch*, 51 *N. Y.*, 140).

Louis Marshall and *A. C. Woodruff*, opposed.

VANN, *J.* — The motion is granted, with ten dollars costs, and the amount of compensation fixed at twenty-five dollars.

N. Y. COMMON PLEAS.

THE CONCORD GRANITE COMPANY, plaintiff and respondent,
agt. HAMLINE D. FRENCH, defendant and appellant.

Costs — Effect of payment of note by indorser upon action brought against maker prior thereto — Code of Civil Procedure, sections 755, 756 — Action, when not to abate — Proceedings upon transfer of interest or devolution of liability.

Where the indorser of a note paid it after an action had been commenced thereon against the maker:

Held, that such payment inured to the benefit of the indorser of the note, but did not furnish the maker with a defense thereon. By the payment the indorser acquired a cause of action against the defendant, and might have asked a substitution as plaintiff here; but the action did not abate, and, under the circumstances, was properly continued by the original plaintiff.

General Term, June, 1883.

Before DALY, C. J., VAN BRUNT and BEACH, JJ.

APPEAL from an order made by the general term of the marine court, affirming a judgment rendered at the trial term thereof.

L. B. Brunnell, for appellant.

C. Brainard, for respondent.

BEACH, *J.* — This action was properly brought against the defendant as maker of the note. Thereafter and before answer the sum due upon it was paid the plaintiff presum-

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ably by the payee and indorser, and the defendant, among other minor defenses, alleged in his answer that such payment was made by the indorser, and the plaintiff was not the real party in interest. The learned court below was not called upon to decide any other question. It was found that the indorser did not pay until after the commencement of this action.

It seems the contention between the parties only affects the question of costs. If the payment averred in the answer was in fact made by the defendant, it would have been better to have plead the truth. The defendant should now be held to his averment.

The evidence contained in the record shows the truth of the allegation in the answer that the note was paid by the Smith Granite Company, payee and indorser, to the plaintiff, as holder after this action was brought. This fact in no way inured as a defense to the defendant. His liability could only be met in this case from payment by him (*Edwards on Bills*, 535; *Story on Promissory Notes*, sec. 401; *Havens agt. Huntington*, 1 Cow., 387).

The Smith Granite Company, by the payment, acquired a cause of action against the defendant, and might have asked a substitution as plaintiff here; but the action did not abate, and, under the circumstances, was properly continued by the original plaintiff (*Code Civil Procedure*, secs. 755, 756). What may result to the defendant from a correct disposition of the issue he made is of no importance, especially under the supposition entertained by me from the evidence that his answer was interposed with an intention of gaining a technical advantage, or escaping the payment of costs, for which he was properly liable.

In regard to the legal *status* of the three parties I concur in the view so clearly expressed by judge McADAM in the court below.

The judgment should be affirmed, with costs and disbursements.

DALY, C. J., and VAN BRUNT, J., concur.

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N. Y. COMMON PLEAS.

METROPOLITAN ELEVATED RAILROAD COMPANY agt. THE MANHATTAN RAILWAY COMPANY and THE NEW YORK ELEVATED RAILROAD COMPANY and others.

Injunction — New undertaking — When injunction must be vacated upon giving new undertaking — Code of Civil Procedure, section 629 — Effect of filing the undertaking and the vacating of the injunction as provided for in the amendment of this section upon a previous motion for the injunction which has been argued and not decided.

Upon an application to vacate the injunction restraining the carrying out of the "merger agreement" upon filing the undertaking provided for under the new amendment of section 629 of the Code of Civil Procedure:

Held, first, that as the defendants were required by the order served upon them to show cause why the injunction therein granted provisionally or *ad interim* should not be continued during the pendency of the action, and as they appeared upon the return day of this order and opposed the application, their so appearing and opposing must, within the meaning of the provision of the recent amendment to this section, be regarded as having the same force and effect as if they had applied upon notice to vacate the injunction.

Second. As the motion of the plaintiff to continue the *ad interim* injunction until the trial and judgment is, though argued, still under consideration, the application of the defendants now to vacate the injunction upon filing the undertaking provided for by the statute is, within the meaning of the new amendment, an application "upon the hearing."

Third. The alleged wrong and injury complained of is capable of being adequately compensated for in money, as it is the withholding from the Metropolitan road of the quarterly payments provided for in the original lease made by the directors, with the approval of the stockholders, and consists in the difference between the amount payable quarterly under that lease and the reduced amount payable quarterly under the October agreements, which reduced amounts the Manhattan Company have so far offered to pay. The extent, therefore, of the injury which the plaintiffs can sustain by vacating the injunction is the amount of that difference from the time of the service of the injunction until the action can be tried and the rights of the parties finally determined by a judgment.

Fourth. An undertaking, therefore, sufficient to cover the amount of this difference from the service of the injunction to the first of January next,

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which difference it is agreed would amount to \$196,000, is the proper measure of the plaintiffs' loss up to that period, and sufficient within the provisions of the new amendment to secure to the plaintiffs adequate compensation in money for any injury they may sustain by the vacating the injunction.

The amendment makes no distinction between injunctions *ad interim* and injunctions *pendente lite*. When the indemnity contemplated by the statute is given it puts an end alike to the injunction *ad interim* and to the motion to continue it while pending and undecided (*See, also, Metropolitan Elevated Railway Company agt. The Manhattan Railway Company, opinion by LAWRENCE, J., ante, 277*).

At Chambers, June, 1883.

APPLICATION to vacate the injunction restraining the carrying out of the "merger agreement" upon filing the undertaking provided for under the new amendment of section 629 of the Code of Procedure.

DALY, C. J. — My opinion upon the following matters, though substantially expressed upon the oral argument, I put in writing that it may appear precisely what the decision has been in respect to them, especially as they are preliminary to the final question that has been argued, which is, the effect of the filing of the undertaking and the vacating of the injunction as provided for in the recently enacted amendment of the Code upon the previous motion for the injunction, which has been argued and not decided, a question upon which I have felt much embarrassment and doubt.

These are my conclusions upon the preliminary matters above referred to :

First. As the defendants were required by the order served upon them to show cause why the injunction therein granted provisionally or *ad interim* should not be continued during the pendency of the action; and as they appeared upon the return day of the order and opposed the application, their so appearing and opposing must, within the meaning of the provision in the recent amendment, be regarded as having the same force and effect as if they had applied upon notice to vacate the injunction.

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Second. As the motion of the plaintiff to continue the *ad interim* injunction until the trial and judgment is, though argued, still under consideration, the application of the defendants now to vacate the injunction upon filing the undertaking provided for by the statute, is, within the meaning of the new amendment, an application "upon the hearing."

Third. The alleged wrong and injury complained of is capable of being adequately compensated for in money, as it is the withholding from the Metropolitan road of the quarterly payments provided for in the original lease made by the directors, with the approval of the stockholders, and consists in the difference between the amount payable quarterly under that lease and the reduced amount payable quarterly under the October agreements, which reduced amounts the Manhattan Company have so far offered to pay. The extent, therefore, of the injury which the plaintiffs can sustain by vacating the injunction is the amount of that difference from the time of the service of the injunction until the action can be tried and the rights of the parties finally determined by a judgment.

An equity term will be held next October, and another in the following December, in either of which the cause can be tried. An undertaking, therefore, sufficient to cover the amount of this difference from the service of the injunction to the first of January next, which difference, it is agreed, would amount to \$196,000, is the proper measure of the plaintiff's possible loss up to that period, and sufficient within the provisions of the new amendment to secure to the plaintiffs adequate compensation in money for any injury they may sustain by the vacating the injunction.

At the equity term in October or in December the plaintiff can compel the defendants to go to trial, or if the court should allow the trial on the defendants' application to be postponed beyond these terms, it will be in the power of the court to exact as a condition that the plaintiff should have such further security as would cover any possible loss or injury to them thereafter.

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Fourth. The form of the undertaking and the amount of it is, according to the provisions of the amended section, to be such as the court or judge before whom the application is made shall direct. My direction is that the undertaking shall be in such a form as to indemnify the plaintiff against any loss or injury they may sustain from the time of the vacating of the injunction to the trial and judgment, and that the amount of the undertaking shall be \$196,000. The three sureties named by the defendants who are to execute the undertaking are satisfactory, and upon the filing of such an undertaking the defendants will be entitled to an order vacating the injunction.

The undertaking being filed and the injunction vacated the question arises as to the effect of the vacating of it upon the motion to continue the injunction during the pendency of the action, which has not been decided.

The plaintiff claims that the only effect is that the *ad interim* injunction is vacated, which leaves the motion still to be decided; that is, that it remains still to be decided, whether the *ad interim* injunction, which has been vacated, shall, in effect, be continued during the pendency of the action. They insist that the distinction must be recognized that the injunction *ad interim* is not an injunction restraining the execution of the agreement *pendente lite*, which is what they moved for; and that it is my duty, notwithstanding that the *ad interim* injunction is vacated, to go and decide upon the motion whether or not the plaintiffs are entitled, during the pendency of the action, to have the restraint continued, the counsel for the plaintiff conceding that if I should decide that they are, and grant such an injunction, that then the defendants would have the right, under the recent amendment, to move to vacate that injunction, upon giving the undertaking provided for in the amendment; which is, in effect, that there may be two undertakings under their recent enactment—one upon vacating an injunction during the pendency of the motion, and another on vacating

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an injunction during the pendency of the action. In brief they claim that under this section, as the matter now stands, there is but one injunction which can be vacated.

I was much impressed with this objection, as the only injunction is the one I granted until the hearing of the motion; but, after a full consideration of this difficulty and a careful examination of the new provision in the Code, I am satisfied that the construction which the plaintiffs put upon it, and which, if they were entitled to a continuation of the injunction, would, if the defendants want the restraint wholly removed, involve the necessity of their giving two undertakings, both of the like effect and amount, cannot be correct. The amendment makes no distinction between injunctions *ad interim* and injunctions *pendente lite*. What this new provision obviously means is, that if the wrong and injury complained of is reparable and capable of being adequately compensated for in money, the party enjoined may be relieved from the restraint imposed by indemnifying the other party against any possible loss or injury he may sustain; and, this indemnity being given, it can make no difference whether the injunction was *ad interim* or to continue until there was a judgment.

The provision is mandatory, that the judge or court "must," unless the alleged wrong or injury is irreparable and incapable of being adequately compensated in money, vacate the injunction upon the filing of the undertaking provided for. It is therefore the duty of the judge, when an application is made to run under this new provision, to determine, first, whether the alleged wrong or injury which the injunction, provisional or otherwise, was granted to prevent can be compensated in money. What the alleged wrong or injury is will appear by the complaint, or the exact nature or effect of it may appear more particularly by the affidavits upon which the preliminary injunction was granted, or by affidavits read by either party upon the application to vacate. If he determine that it can be adequately compensated by money, then the

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duty is imposed upon him to fix the amount of the undertaking, which must necessarily be such an amount as would cover any pecuniary injury which the party who obtained the injunction could sustain by removing the restraint which was imposed to prevent that injury. This implies on the judge's part a knowledge acquired, from the facts before him, of the nature and extent of the injury apprehended, and, if it should happen, what would be an adequate compensation for it in money; which amount, in my opinion, it is his duty to require in the undertaking, within the plain meaning of this new provision. Having done this, and directed both in form and by the amount of the undertaking what will indemnify the plaintiff for "the alleged wrong or injury," the undertaking so directed is filed, and the injunction order vacated, which, it appears to me, puts an end to all further proceedings upon the application for an injunction, a pecuniary indemnity having, in the manner provided for in the statute, been substituted for the previous equitable remedy by injunction.

If all this has been done, then the plaintiffs have been indemnified against all possible loss or injury that may happen to them from that time to the determination of the action, by the defendants doing any of the acts which they were restrained from doing; and I wholly fail to see why there should or how there can be any further proceeding in the motion for the injunction.

If the judge should hold on the return of an order to show cause that there was no ground for the injunction which he had granted *ad interim*, that would be the end of the motion for the continuation of it. The decision would be that the motion must be denied, and the injunction vacated. The effect is analogous when the judge holds, under this new provision, that the wrong and injury complained of can be compensated in money, and that the *ad interim* injunction he granted must be vacated upon the defendants filing an undertaking in the amount which the judge directs, and the defendants, in making such an application, may be said

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impliedly to admit the right to the injunction and to the continuation of it in the same sense that a defendant concedes the right to make the arrest, when he gives bail, instead of moving to discharge it.

In my opinion, when the idemnity contemplated by the statute is given it puts an end alike to the injunction *ad interim* and to the motion to continue it. After a very careful examination and full reflection, I can come to no other conclusion. In doing so, I fully appreciate the reason for the earnestness with which the plaintiff's counsel has urged that I should still go on and decide the motion. The question discussed in it, the validity of the October agreement, is the main question in the action, having other questions involved with it as to the plaintiff's right to impeach the validity of these agreements.

A great deal of time has been devoted to the preparation of the argument upon both sides. Many days were occupied by the oral argument. Voluminous briefs were afterwards printed and submitted, embracing a very large citation of authorities. Under these circumstances the plaintiffs feel strongly that so much time should be lost, labor devoted and expense incurred without any result, by having the motion arrested and put an end to, under a provision in the Code which took effect as a law, after the motion had been argued. But the statute is imperative; the further consideration of the motion depends upon its construction, and the interpretation I have put upon it is, in my judgment, the correct one.

Williams agt. Western Union Telegraph Company.

N. Y. SUPERIOR COURT.

WILLIAM S. WILLIAMS and RUFUS HATCH agt. THE WESTERN
UNION TELEGRAPH COMPANY.

*Code of Civil Procedure, section 629 — Cases that do not fall within the class
of actions contemplated by the late amendment to this section.*

The court has power, notwithstanding the pendency of the appeals in the court of appeals, to vacate the injunction orders upon defendants executing undertakings as provided by this new amendment of section 629 of the Code of Civil Procedure, if proper and sufficient grounds are presented.

But when, as in these cases, the general term has decided that the distribution, without consideration, of a large amount of stock was in violation of positive law, and consequently the payment of dividends on such stock would be illegal, and that plaintiffs have a sufficient standing in court to call for the enforcement of the law, they do not fall within the class of actions contemplated by the amendment.

No court has any right or power, upon an offer by a corporation to indemnify a few individuals against pecuniary loss, to grant in effect permission to such corporation to continue to violate the law of the land (*See, also, Metropolitan Elevated Railway agt. The Manhattan Railway Company, ante, 277; and Metropolitan Elevated Railroad Company agt. The Manhattan Railway Company and The New York Elevated Railroad Company and others, ante, 319*).

Special Term, July, 1883.

MOTION to vacate the injunction orders of December 26, 1882, upon defendants executing undertaking as provided by section 629 of the Code of Civil Procedure.

FREEDMAN, J. — I have no doubt of the power of the court, notwithstanding the pendency of the appeals in the court of appeals, to grant the relief prayed for on these motions, if proper and sufficient grounds were presented; for I do not find that the Code of Civil Procedure has changed the law as laid down by me in *Ireland agt. Nichols* (9 Abb. [N. S.], 71). But the motion papers do not present proper and sufficient grounds. The general term of this court has decided that

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the distribution, without consideration, of \$15,000,000 of stock was in violation of positive law; that consequently the payment of dividends on such stock would be illegal, and that the plaintiffs have a sufficient standing in court to call for an enforcement of the law. Assuming, as I must, the correctness of this decision, the cases at bar do not fall within the class of actions contemplated by the amendment of 1883 to section 629 of the Code of Civil Procedure. No court has any right or power, upon an offer by a corporation to indemnify a few individuals against pecuniary loss, to grant in effect permission to such corporation to continue to violate the law of the land.

The motion must be denied, with ten dollars costs.

SUPREME COURT.

THE PEOPLE *ex rel.* CHARLES BRAY *et al.* agt. THE BOARD
OF SUPERVISORS OF ULSTER COUNTY.

Costs of a special proceeding — What costs are recoverable upon an appeal from an order granting a peremptory mandamus, when such order is affirmed — Code of Civil Procedure, section 3240.

The costs to be allowed, and which are recoverable upon an appeal from an order granting a peremptory *mandamus* when such order is affirmed, is regulated by section 3240 of the Code of Civil Procedure, and in the discretion of the court, are the same costs which are given on "an appeal from a judgment."

Ulster Special Term, June, 1883.

MOTION to readjust costs as taxed by the clerk of Ulster county, upon an affirmance by the general term, with "the costs of the appeal," of an order of the special term granting a peremptory writ of *mandamus*.

Wm. Lounsbury, for the motion.

Howard Chipp, Jr., opposed.

People *ex rel.* Bray *et al.* agt. Board of Supervisors of Ulster County.

WESTBROOK, J. — The general term has affirmed the order of the special term granting, in the above entitled proceeding, a peremptory *mandamus*, with “the costs of the appeal.” The question which this motion presents is: What costs are recoverable upon an appeal from an order granting a peremptory *mandamus*, when such order is affirmed?

Section 3240 of the Code provides that, “upon an appeal in a special proceeding,” the successful party, “in the discretion of the court,” shall recover costs “at the rates allowed for similar services in * * * an appeal from a judgment taken in the same court,” unless the costs to be recovered are “specially regulated in this act.” Unless, then, the amount of costs to be recovered upon an *appeal* from an order allowing a peremptory *mandamus*, which is unquestionably a special proceeding, are fixed at a special sum by the Code, this section (3240) controls.

The counsel for the supervisors claims that section 2086 applies. That section does not, in my opinion, fix the costs upon an *appeal*. It only provides for an allowance of fifty dollars as costs upon the *original* application. Neither does any other section, to which my attention has been called, provide specially for costs in a case of this character on appeal. The result is that section 3240, *as it now reads* (See *Throop's edition of 1882*) applies, for it gives, “upon an appeal in a special proceeding,” the same costs which are given on “an appeal from a judgment.” It is true that such costs are “in the discretion of the court,” but when the court has allowed costs, it is to be assumed that they allowed such as they had power to award, and that, therefore, in this case, costs as provided for in section 3240 are given.

The motion to correct the taxation by the clerk, who has allowed costs as upon an appeal from an order made upon a simple motion, is granted, with ten dollars costs.

Adams & Lang agt. West Shore, etc , Railroad Company.

SUPREME COURT.

ADAMS & LANG, appellants, agt. WEST SHORE, &C., RAILROAD
COMPANY.

Practice — Answer may be interposed by way of amendment to demurrer.

Where a demurrer is served, an answer may be interposed by way of amendment.

Second Department, General Term, June, 1883.

C. B. Alexander, for respondent.

W. W. Badger, for appellant.

DYKMAN, *J.* — The defendant interposed a demurrer to the complaint in this action, and afterwards served an answer. Thereupon the plaintiff moved the court to strike out the answer as irregular, or to compel its correction in many ways specifically pointed out. The motion was denied, and this appeal is from that order.

Both the demurrer and the answer were retained by the plaintiff's attorney, and the latter pleading superseded the first. The cause will be tried on the questions raised by the answer, and the demurrer will be considered as waived (*Musgrave agt. Webster*, 53 *How.*, 365).*

The other grounds of the motion require no detailed statement. They relate to frivolous objections and are untenable.

The order should be affirmed, with costs and disbursements.

* See, also, *The People agt. Whitwell*, 62 *How.*, 383.

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N. Y. SUPERIOR COURT.

MICHAEL GILMAN, as administrator, agt. HENRY McARDLE.

Trusts for pious purposes — When attempted trusts for such purposes will be declared void — When trust fails for want of a beneficiary — Right of a legal representative of a husband to sue for a chose in action belonging to the wife at the time of her death, and not reduced to possession by the surviving husband during his lifetime.

The right of a husband to administer upon the estate of his deceased wife confers upon his legal representative the capacity to sue for a chose in action belonging to the wife at the time of her death, and not reduced to possession by the surviving husband in his lifetime.

Moneys belonging to the wife of plaintiff's intestate were placed by her in the hands of defendant, with the direction and upon the condition that after the death of herself and her husband he should use the fund to have masses said by a Roman Catholic priest for the repose of their souls: *Held*, that though such a use is not void upon general principles of public policy, and the trust is not invalid, because it relates solely to personal property, nor because it was not declared in writing, yet it cannot be upheld, because there is no beneficiary or *cestui que trust* in existence, or capable of coming into existence under it; and if the trust fails, the disposition made of the money cannot stand, because it amounted neither to a gift nor to a disposition by last will and testament. There was only a mere naked deposit of money into the hands of the agent, with certain instructions concerning the employment and payment from time to time of a third person, namely, a Catholic priest, for services to be rendered, and the principal may at any time revoke the instructions and recover his property, and if he does not do so in his lifetime, and dies intestate, his death revokes the authority of the agent, and as the title must go somewhere, it goes to the administrator of the intestate. From the moment the administrator objects, the agent must cease paying out. But up to that time he will be protected for acts done in good faith.

Special Term, July, 1883.

John Brice and William Suydam, for plaintiff.

C. W. Bennett and Richard L. Swezy, for defendant.

FREEDMAN, J. — This is an equitable action brought by Michael Gilman, as administrator of the estate of James

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Gilman, deceased, and its object is to have a certain trust declared null and void, and to compel the defendant, as the alleged trustee, to account.

On the 23d of August, 1882, Margaret Gilman, then about eighty-five years old, placed about \$2,300 of money belonging to her into the hands of the defendant, with the direction and upon the condition that, after the death of herself and her husband, who was then over ninety years of age, the defendant should use the money, in the first place, to pay funeral expenses and erect a suitable monument to their memories; and, in the second place, to have masses said by a Roman Catholic priest for the repose of their souls.

About eight days after the delivery of the money to the defendant — viz., September 1, 1882 — Margaret Gilman died intestate and without issue, and on the thirteenth of October following, James Gilman, the husband, also died intestate.

The plaintiff, as next of kin of James Gilman, took out letters of administration on the estate of James Gilman, and, as such administrator, demanded that the defendant account for and pay over the money received by him, and upon defendant's refusal to do so brought this action.

The theory of the action is that at least the second use or purpose of the trust is contrary to public policy and wholly illegal and void.

The first question that presents itself is whether the plaintiff has legal capacity to maintain the action. Its determination depends upon the correct solution of the further question whether the right of James Gilman to administer upon the estate of his deceased wife conferred upon the plaintiff, as his legal representative, the capacity to sue for a chose in action belonging to the wife at the time of her death and not reduced to possession by the surviving husband in his lifetime.

At common law, marriage was an absolute gift to the husband of the personal property of which the wife was actually possessed, and of such as came to her during coverture.

As to choses in action, marriage was only a qualified gift,

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conditioned that the husband reduce them to possession during the existence of the marriage relation.

As to all personal property possessed by the wife at the time of the marriage, and such as came to her during coverture, and also such choses in action as the husband reduced to possession during coverture, the title was vested in the husband, and upon his death, such personal property and choses in action went to his representatives, and not to the wife; and if the wife died first, they were his after, as they were before her death, and no administration was necessary.

As to choses in action not reduced to possession during marriage, if the wife survived the husband, they went to her, and, upon her death, to her representatives; but if the husband survived, he had the sole right to administer for his own benefit and enjoyment in preference to the next of kin.

These common-law rights of the husband, and the consequences flowing from them, are still recognized in this state in the case of a wife dying intestate, leaving no descendants and a husband surviving.

The statutes of this state give to the wife the control of her separate estate during her life, and she may dispose of it by will. In case of a will, the testamentary disposition stands. In the absence of a will, if there are descendants, the succession is regulated by the statute of distribution. But in case a married woman dies intestate, and leaves no descendants, the common law right of the surviving husband to administer his deceased wife's estate, and through such administration to acquire the title to her personal property and choses in action not reduced to possession during coverture, subject only to the payment of her debts, still exists. This has been expressly decided in *Barnes agt. Underwood* (47 N. Y., 351). And in all cases it is now provided by statute that in the case of a married woman dying intestate, her husband shall be entitled to administration in preference to any other person (3 R. S. [6th ed.], 78; formerly sec. 27); that if he shall not take out letters of administration on her

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estate, he shall be presumed to have assets in his hands sufficient to satisfy her debts, and shall be liable therefor, and that if he shall die leaving any assets of his wife unadministered, they shall pass to his executors or administrators as part of his personal estate, but shall be liable for her debts to her creditors in preference to the creditors of the husband (*Id.*, sec. 33; formerly sec. 29).

From the foregoing it is clear that if, upon the death of Margaret Gilman, her husband, James Gilman, had taken out letters of administration upon her estate, his right of action against the defendant now here would, upon his death, have passed to the present plaintiff, as administrator. But as James Gilman did not do so, it is necessary to determine whether that omission affects the standing of the plaintiff in court. From what has been said in *Squib agt. Wyn* (1 *Peere Wms.*, 378); *Elliott agt. Collier* (1 *Wils.*, 169, and 2 *Kent's Com.*, 136), it would seem that it is not. At any rate, my judgment is that under the true construction of what formerly was the twenty-ninth section of the statute above referred to it is not; because, above the conflict of judicial expression in the books as to whether the husband in a case like the present, upon the death of his wife, takes a chose in action not reduced to possession by him during coverture, as husband or as administrator, there stands forth the universally conceded fact that, in some way or other, he is entitled to the ultimate benefit to be derived therefrom because he sustains the relation of husband. From this it follows as a logical and necessary sequence that his right in this respect, at least by force of the statute, passes to his personal representatives. That in a case like the present the administrator or executor of the estate of the husband, in his representative capacity as such, may have letters of administration upon the estate of the wife, was decided in *Matter of Harvey* (3 *Redf.*, 214), affirmed by the general term of the supreme court; but that such letters are not necessary to enable him to maintain an action, was

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also decided in *Rosevelt* agt. *Ellithorp* (10 *Paige*, 415), and *Lockwood* agt. *Stockholm* (11 *Paige*, 87).

Whether, therefore, the fund in suit be regarded, for the purposes of determining the question of plaintiff's capacity to sue, as a chose in action, or as property legally in the wife's possession at the time of her death (upon the theory that the possession by the defendant as the wife's trustee or agent under a void trust was not adverse, but in the eye of the law was still her possession), the plaintiff in either case has legal capacity to sue for it.

This brings me to the consideration of the second question, viz., the validity or invalidity in law of the disposition of the money made by Margaret Gilman.

Such disposition constituted neither a gift *inter vivos*, nor a gift *causa mortis*, for the requisites of a gift were wanting. There was no intention of parting absolutely with the title and control, but specific uses were enumerated to which, after the death of Mrs. Gilman and her husband, the money was to be appropriated. By such a disposition Mrs. Gilman sought to create a trust for the uses specified.

In so far as the trust thus attempted to be created has been executed by the payment of funeral expenses and the erection of monuments, the plaintiff does not seek to hold the defendant liable. The controversy relates to that part of it which directs the saying of masses, and the discussion will hereafter be confined to that point.

In England, this use would be held void as a superstitious one, in that country, when land is given, secured or appointed for or toward the maintenance of a priest or chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man; to have and maintain perpetual obits, lamps, torches, &c., to be used at certain times to help to save the souls of men out of purgatory, the king or queen, by force of certain statutes, is authorized to direct and appoint all such uses to such purposes as are truly charitable (23 *Hen. VIII*, chap. 10; 1 *Edw. VI*, chap. 14; *Bac. Ab. Charitable*

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Uses and Mortmain; *D. Duke on Char. Uses*, 105). These statutes were aimed at such usages of the Roman church as were condemned by the Protestant reformation. There is no express English statute, however, making superstitious uses in general void, and the 23d *Henry VIII* relates in terms only to assurances of land to churches and chapels. But although there is no present English statute rendering the disposition of personal property for superstitious uses void, the courts of England have, nevertheless, in all such dispositions of property, whether real or personal, held the uses to be void upon general principles of public policy.

In the state of New York and in all the states of the United States, where there is no established state religion, where all religious opinions are free, and the right to exercise them is secured to the people by constitutional guarantees, there is no such statute and no such policy, and I do not hesitate to say that the doctrine of superstitious uses, as enforced by the courts of England, is against the spirit of our institutions, and should not be adopted by our courts. It is a fundamental principle of our law that a man may do with his own as he pleases, provided he does not violate the law nor devote his property to an immoral purpose. Similar views have been expressed by judge TULLY, of Chicago, in *Kehoe agt. Kehoe*, and by the surrogate of Kings county, New York, *In the Matter of the Probate, &c., of the Will of Maria Hagenmeyer, deceased*. In these two cases, however, the question presented itself upon a testamentary disposition.

The question of policy having been disposed of, in so far as it rests upon religious grounds, it remains to be seen whether the trust sought to be created is invalid for any reason known to law or equity as administered in this country.

It clearly cannot be upheld as a trust for a charitable use. According to the English law, based upon certain prerogatives of the crown and the statutes of 43 *Elizabeth* (*chap. 4*), the court of chancery in England exercised a certain peculiar jurisdiction over charitable trusts, in determining and apply-

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ing gifts to charity where the donor had failed to define them, and in framing schemes of approximation near to or remote from the donor's true design. Where, therefore, there was a gift for a general and indefinite charitable purpose, either the king under his sign manuel or the court representing him disposed of the subject donated.

The statute of Elizabeth was repealed by the legislature of this state in 1788, and the prerogative of the crown had, of course, no effect in this state; but the powers and jurisdiction of the English court of chancery, as they existed in England at the time of the American revolution, were supposed to have followed and remained with courts of equity in this state, and the law of charities, it was claimed, independent of the statute of Elizabeth, was in force prior to that statute and continued after its abolition. In the consideration of this subject by the courts of this country it was, however, determined that the English doctrine with respect to charitable trusts, as it existed at the time of the revolution, according to the common law, irrespective of statutory enactment, was only to be considered in force here so far as it was applicable to our circumstances and conformable to our institutions and not repugnant to them. With this determination the power exercised by the English court of chancery to declare a trust void on the ground that it was for a superstitious use, and to direct the use to a purpose truly charitable wholly ceased to exist in this country. But a charity must still be a gift: 1. Either for the promotion of science or learning or useful knowledge. 2. Or for the relief of the sick, lame or infirm. 3. Or for the relief of the poor or redemption of prisoners or captives. 4. Or for the building or repairing of bridges, ports, highways, churches or other public structures. In short, a charity is a gift for a general public use, extending to the poor as well as to the rich, which is free from any personal, private or selfish taint. The disposition made by Mrs. Gilman of her money cannot be brought within this definition.

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Nor can it be said that such disposition created a trust for a pious use. Such a trust consists of a gift for the dissemination of moral or religious teaching or the promotion of public worship or morality. All gifts falling within this description are regarded as pious uses, and by a broad and liberal construction are enforceable as such in equity. Since the revolution pious uses have been upheld in this country without regard to sect or denominational distinction. The disposition made by Mrs. Gilman does not fall within this class of cases.

On the other hand, it will be found that the trust purpose of the trust sought to be established by Mrs. Gilman is open to no legal objection, because the trust, if it is one, relates solely to personal property, and, as such, is not within the statute of uses and trusts of this state. A trust of personal estate may be created for any purpose which is not illegal, so far as relates to the mere vesting of the legal title to the property in the trustee (*Gott agt. Cook*, 7 *Paige*, 521; *Burklin agt. Burklin*, 1 *Keyes*, 141; *Perry agt. Foster*, 62 *How.*, 228). So, if the trust were otherwise valid, it would not be a fatal objection that it was not declared in writing (*Martin agt. Funk*, 75 *N. Y.*, 134).

But the difficulty with the defendant's case is, that the trust sought to be created by Mrs. Gilman is no trust at all known to law or equity, because there is no beneficiary or *cestui que trust* in existence, or capable of coming into existence under the trust, and that if, for the reason stated, the trust fails, the disposition made of the money cannot stand, because it amounted neither to a gift nor to a disposition by last will and testament. Our statutes describe how the personal property of a person dying intestate shall be distributed. They disclose a well defined policy upon that point. They apply to personal property and choses in action of every description not actually and finally disposed of by the intestate in his lifetime by some mode recognized by law, and they permit no other disposition. Consequently as there was no

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will nor a gift, unless a valid trust was created amounting to an actual and final disposition in suit, the law steps in and directs where the money shall go.

Now, as essential to the validity of every trust, there must be four things: 1. A subject-matter. 2. A person competent to create it. 3. One capable of holding as a trustee; and, 4. One for whose benefit the trust is held.

In the present case the first three exist, but the fourth does not. The trustee might be supplied if necessary, for it is a well settled principle in equity that a trust once properly created shall never fail for want of a trustee, and the court can always appoint a person to execute it. But the court cannot supply a beneficiary or *cestui que trust*. Beneficiaries may be natural or artificial persons, but they must be persons in existence or capable of coming into existence under the trust. If they answer that requirement and can be ascertained and identified, it is not necessary that they should be named specifically. In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust.

In the case at bar the beneficiaries are both dead, and beyond the reach of human law. Their souls are intended as the beneficiaries, and the money is to be expended for masses for the repose of their souls. But the soul of one who has departed this life is incapable of taking an interest in the property left behind, nor is it in any sense subject to the jurisdiction of any legal tribunal. A court of equity protects the rights of the living. It cannot extend its jurisdiction to beings which cannot be apprehended within the boundaries of the realm.

For the reasons stated, the trust sought to be created failed for want of a beneficiary. That being so, and there having been neither a gift nor a testamentary disposition, a resulting trust arises by implication of law, under the circumstances of this case, in favor of the plaintiff as the legal representative of

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the husband of the donor, against the defendant, and the defendant must account.

The plaintiff is entitled to judgment declaring the invalidity of the trust and adjudging the defendant liable to account for all the moneys still in his hands. As to all payments made by the defendant in good faith, he is entitled to claim protection.

On a motion for settlement of findings and award of costs and for interlocutory judgment the following opinion was rendered:

FREEDMAN, *J.* — To correct misapprehension as to the scope of the opinion heretofore filed by me in this case, and to prevent misunderstanding hereafter, I restate the position taken by me.

In entering upon the discussion of the questions relating to the validity of the disposition made by Mrs. Gilman of her money, I commenced by pointing out that according to the law of England *every* disposition of property, real and personal, for the purpose of having masses said, &c., though in form the title is passed, is held void by the courts of that country, namely, a disposition of *real* property by force of certain statutes directed against so-called superstitious uses, and a disposition of *personal* property upon general principles of public policy enforced by the courts. I then held that in the United States there is no such statutes or policy, and that such a policy should not be adopted by the courts.

If, therefore, Mrs. Gilman had made a will and bequeathed her money to her executor for the purpose of having masses said for the repose of her soul or that of her husband, or both, or to a particular church or priest for such purpose, I would certainly have upheld the bequest, because under the testamentary disposition the title would have passed.

So if in her lifetime she had given the money absolutely to a particular church or priest with the request to have masses said, I should not have hesitated to uphold the gift, because the title would have passed.

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So if she had given the money to the defendant in this action in such a way that the title passed to him unconditionally and beyond recall, and merely requested him to have masses said, but left it to him whether he would do it or not, I would still have upheld the gift.

But she did none of these things. She attempted to create a trust by parol instructions, and a bare delivery pursuant to such instructions, and yet retain the title to the money. The defendant, who is an undertaker, was to have no interest or benefit in it.

In discussing this *supposed* trust, and noticing the points of counsel made in *this* connection, I showed that, though it was not a trust for a charitable use, nor a trust for a pious use, within the meaning of these terms as known to the law of trusts, the purpose of the trust, viz., to have masses said, was, nevertheless, open to *no* legal objection, but that the difficulty was that the supposed trust was no trust at all which the law can recognize, because there was no longer any person in existence, or capable of coming into existence under the trust, that could call the alleged trustee to an account in a legal tribunal if he should refuse to execute the trust and convert the money to his own use. I should have added here, as an additional reason why it was no trust at all, that there had been no gift or other disposition by which the title passed, for every trust must be founded upon such a gift or disposition. But as I had previously disposed of that question I supposed the reiteration was unnecessary.

It, therefore, will be seen that the case really came down to this: No title passed by either a bequest or gift or legal trust. There was only a mere naked deposit of money into the hands of an agent with certain instructions concerning the employment and payment from time to time of a third person, namely, a Catholic priest, for services to be rendered. In such a case it is a fundamental principle of the law of this state that the principal may at any time revoke the instructions and recover his property; and that if he does not do so

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in his lifetime and dies intestate his death revokes the authority of the agent; and that as the title must go somewhere, it goes to the administrator of the intestate. In such a case the character of the instructions is wholly immaterial. From the moment the administrator objects the agent must cease paying out. He can no more pay for the erection of monuments than he can pay for having masses said. But up to that time he will be protected for acts done in good faith.

Thus it will be seen that if instead of calling for the saying of masses the instructions of Mrs. Gilman had been that the defendant, as her agent, should from time to time employ and pay a suitable person to hoist the American flag on the fourth day of July, in each and every year, over the house in which she died, I would have been bound to render precisely the same decision which I did render.

The findings submitted are settled in strict conformity with these views, and the interlocutory judgment to be entered must also correspond therewith. As to all acts done by the defendant in good faith before the administrator demanded the money he must be protected. But all questions arising in this connection should be determined upon the accounting.

As to costs I can only decide at present that none are to be awarded against the defendant personally. Under the circumstances of the case not only was he almost under a moral obligation to have his rights passed upon by a court of competent jurisdiction, but the question of plaintiff's legal capacity to sue was also a very complicated question. For these reasons I deem it a wise exercise of the discretion vested in me not to inflict costs upon him. All other questions pertaining to costs to be paid out of the fund should stand over without prejudice until the coming in of the report upon the accounting.

In conclusion I wish to state yet that in consequence of the imperfect newspaper report which I had of the case before judge TULLY, I referred to that case as one arising under a will. I have since ascertained, though I have not been able

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to procure an authentic report, that it was a case of conveyance by deed absolute upon its face, which passed the title as effectually as a will would have done.

SUPREME COURT.

HENRY H. PAULSEN agt. BURHANS VAN STEENBERGH,
as President, &c.

Corporation — A creditor at large cannot maintain action against directors for misconduct — Code of Civil Procedure, sections 1781, 1782.

The term "creditor," as used in sections 1781 and 1782 of the Code of Civil Procedure, means a judgment creditor and not a creditor at large. A creditor at large cannot maintain an action for the relief provided in section 1781.

Special Term, July, 1883.

George W. Green and W. H. Cuddleback, for plaintiff.

S. W. Fullerton, for demurrer.

BROWN, J. — The complaint in this action contains two causes of action: One against the defendant as an individual, and one against him as president of the Goshen Foundry and Gas Machinery Company. The plaintiff disclaims any intention to allege but one cause of action, but the relief asked for shows that the pleader had in his mind two claims, one in the plaintiff's favor against the defendant, and the other in favor of the corporation against the defendant in his official capacity. The prayer of the complaint is:

First. That the defendant account, in his official capacity, for the funds and property of the corporation, and also that he account to and with the plaintiff for the property and funds belonging to the plaintiff, which are and were in his possession, and that such account determine the amount due

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to the corporation, and also the amount "from said defendant to the plaintiff."

Second. That the defendant be adjudged to deliver to the plaintiff the shares of stock to which he is entitled, and in default thereof that plaintiff have judgment against the defendant for the value.

Third. That he be required to pay over and transfer to the corporation all money and property to which said company shall be entitled, &c.

There was, therefore, in contemplation of the pleader, a claim in favor of the plaintiff against the defendant, upon which the plaintiff was to remove a judgment, and also a claim upon which there was to be rendered a judgment in favor of the corporation.

The first claim was based on a contract made with the defendant in his individual capacity, and, as such, it could be made the basis of an action against the defendant. It is true it is alleged that it was ratified by the defendant as president, and if by that it was intended to allege and claim that the corporation ratified the agreement, acting through the defendant as its agent, it would constitute a good ground for a claim against the corporation, but not against the defendant as president.

It is clear that, so far as the plaintiff has any claim arising out of the facts set forth in the seventh clause of his complaint, it is either against Van Steenberg individually or against the corporation, and that in either event it is an entirely distinct and separate claim or cause of action from that set forth in the other parts of the complaint.

The two causes of action are improperly joined (*Code, sec. 484*), and the objection is properly taken by demurrer (*Code, sec. 488*).

It is claimed, however, by the plaintiff, that the allegation that the contract made with Van Steenberg was ratified by the defendant as president, was inserted to show that plaintiff is a creditor of the corporation by reason of the contract so

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made and ratified, and that upon the whole complaint there is but a single cause of action, which the plaintiff is entitled to prosecute under section 1781 of the Code. Assuming this to be true, the complaint shows on its face that plaintiff is not a judgment creditor, but a creditor at large.

The right to maintain an action for the relief provided in section 1781 is given by the section next following to creditors of the corporation; and I am of the opinion that the term creditor, as used in this section, means a judgment creditor.

Cole agt. The Knickerbocker Life Insurance Company (23 *Hun*, 255), was an action very similar in its objects to the case at bar, and in that case the general term of the second department sustained a demurrer to the complaint, on the ground that the plaintiff was not a judgment creditor, and that a creditor at large could not maintain the action. This case went to the court of appeals, and the appeal was dismissed on January 10, 1883. The decision is in accord with general principles. A court of equity is not the *forum* for litigating disputed claims, and, as a general rule, will not entertain an action or afford relief to a creditor until he has established his debt in a court of law.

I am of the opinion that the demurrer is well taken, and that the defendant must have judgment on the demurrer, with costs.

SUPREME COURT.

JOHN G. WILMERDING and others, appellants, agt. JOHN CUNNINGHAM, respondent.

Attachment — Insufficiency of affidavits.

Affidavits that about a week after defendant's goods, amounting to about \$250, were delivered to the defendant, he made a general assignment for the benefit of his creditors, with \$10,000 of preferences, and that plaintiff's goods, which were adapted to defendant's business, could not be discovered in his store, are insufficient upon which to grant an attachment when the assignment was assailed by no fact indicating it to have

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been in any respect inconsistent with the legal rights of defendant's creditors, and no probably fraudulent disposition of the goods was shown.

A statement in an affidavit that other affidavits had been made and were on file in the office of the clerk, from which it appeared that defendant had purchased goods which had in like manner disappeared, did not strengthen plaintiff's case in the absence of extracts from these affidavits containing a statement of the facts referred to.

First Department, General Term, June, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order vacating and setting aside an attachment.

Blumenthal & Hirsch, for appellants.

John J. Adams, for respondent.

DANIELS, J. — Aside from the facts which other affidavits not made or produced in this case were relied upon as establishing, the proof was insufficient to warrant an attachment. The affidavits read established the fact that within about a week after the plaintiff's goods were delivered to the defendant, amounting to the sum of \$256.25, he made a general assignment for the benefit of his creditors, containing preferences to the amount of over \$10,000; that his business was that of a manufacturer of cloaks and ladies' suits, for which the goods purchased from the plaintiffs were adapted, and on the 21st of March, 1883, they could not be discovered in the store.

As the assignment was assailed by no fact or circumstance indicating it to have been in any respect inconsistent with the legal rights of the defendant's creditors, and no probably fraudulent disposition of the goods was shown, the right to an attachment by these affidavits was not made out. But in further support of the application it was stated in an affidavit made by one of the plaintiffs that other affidavits had been

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made and were on file in the office of the clerk from which it appeared that the defendant had purchased goods which had in like manner disappeared, and had purchased other goods of Jaffray & Co., not in fact delivered to him. No extracts from these affidavits were made containing any statement of the facts referred to, and because of that omission the case was not brought within the decision of *Bennett* agt. *Edwards* (27 Hun, 252). The most that was done was to state the conclusion of the person making the affidavit, that the other affidavits proved the facts alleged. But that is not allowable in proceedings of this description, "for the office of an affidavit is to bring to the court the knowledge of facts, and therefore it should be confined to a statement of facts only as they substantially exist, with all necessary circumstances of time, place, manner and other material incidents. It is improper to state conclusions of law or legal propositions. It must not state arguments nor draw inferences" (3 *Greenleaf on Evidence* [8th ed.], sec. 381).

In these important respects the affidavit was defective, and, without these defective statements, the facts established did not permit the issuing of an attachment.

The order should be affirmed, with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concur.

Hayes agt. Bowe.

N. Y. COMMON PLEAS.

LUTHER M. HAYES agt. PETER BOWE, sheriff.

Imprisoned debtors — Order for discharge must be made by the court — When it does not appear on its face that the discharge was an order of the court, Sheriff not bound to discharge prisoner.

Where it does not appear upon the face of an order for the discharge of an imprisoned debtor whether it was made by the court or by a judge out of court, as the order must in all cases be made by the court, the sheriff is not to be subjected to an action for false imprisonment because he refused to discharge the debtor from imprisonment upon the order, especially after such debtor was advised that the order was defective.

General Term, June, 1883.

DALY, C. J.—The application for the discharge of an imprisoned debtor must be either to the court where the judgment was rendered, and under which he was arrested and imprisoned, or to the court of common pleas of the county; and the order for his discharge must be made by the court (*Mather's case*, 14 Abb., 45; *In the matter of Walker*, 2 Duer, 655). Whether the order in this case was made by the court does not appear upon the face of the discharge. For all that appeared, it may have been an order made by judge LARREMORE out of court. It is entitled in the court of common pleas, and so are the orders made by a judge at chambers. It refers to a petition presented to the court, and of an assignment of all the real and personal estate of the debtor having been made and executed by the plaintiff in pursuance of an order of the court. But whether anything further was done by the court does not appear on the face of it. All that it states afterwards is that, on the motion of the counsel for the defendant, "it is ordered that the defendant be discharged from custody," and it is signed R. L. LARREMORE, J. C. P.

It may be that if the sheriff had acted upon this order, and discharged the defendant, he would have been protected by

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showing the proceedings in court in connection with it, though I am inclined to think, as the counsel for the sheriff claims, that the assignment is defective. But, be that as it may, the sheriff is not to be subjected to an action like this, for false imprisonment, because he refused to discharge the plaintiff from imprisonment upon this order, especially after the plaintiff was advised that the order was defective by the legal gentleman who was acting for the sheriff, that gentleman having, by letter, upon the previous day, advised the plaintiff that there was some irregularity in the order of discharge that had been filed with the sheriff which rendered the validity of the discharge questionable, and requested him to call at his (Mr. Graham's) office in relation to it.

It was an easy matter, if all the previous proceedings were regular, to have had the order entered in the usual way, as an order of the court, and to obtain a copy of it authenticated by the clerk in the ordinary form. This it appears the plaintiff did not do, and being retaken within the jail limits on a remand, he brought this action for false imprisonment. As it did not appear on its face that this discharge was an order of the court, the sheriff was not bound to ascertain whether it was or to examine to see upon what proceedings it was founded (*Earl agt. Camp*, 16 *Wend.*, 656), in which case, the court say: "That in general ministerial officers ought not to look beyond the process, and in no case need they do so." The sheriff did all that he was required to do, when, both by the under sheriff and by his legal adviser, he called the plaintiff's attention to the irregularity appearing on the face of the process.

I think, therefore, that the action was properly dismissed and that the judgment by the judge at special term should be affirmed.

J. F. DALY, J., concurs.

Brown agt. Moran.

N. Y. COMMON PLEAS.

EDWARD BROWN, plaintiff and respondent, agt. CHARLES MORAN, Jr., defendant and appellant.

Adjournment — When refusal to adjourn trial cannot be reviewed on appeal — What must be made to appear when adjournment is asked on account of absence of witness — Negligence — when question of, does not arise.

A motion to adjourn in the marine court is addressed to the discretion of the trial judge, and although it is subject to review by the general term of that court, such discretion cannot be reviewed on appeal to the court of common pleas.

A party is not entitled to an adjournment on account of the absence of a material witness, unless it is made to appear that the attendance of the witness can be procured within a reasonable time.

Where willful trespass is committed, the question of negligence does not arise.

General Term, May, 1883.

Before VAN BRUNT, J. F. DALY and VAN HOESSEN, JJ.

APPEAL from an order of the general term of the marine court, affirming a judgment rendered at the trial term thereof by Mr. justice McADAM.

J. M. Bowers, for appellant.

J. F. Fallon and L. J. Conlan, for respondent.

VAN BRUNT, J. — The claim made upon the argument of this appeal, that it was error for the judge to refuse to postpone the trial, even if his ruling could be reviewed in this court, is not well founded. The motion to postpone was addressed to the sound discretion of the court below, and although the discretion of the judge at the trial term might be reviewed by the general term of that court, this court cannot review the discretion of the general term of the marine court. Even if such discretion could be reviewed, we see no reason

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for reversing their action. The trial of the cause had been postponed on account of the absence of this witness, and at the time of the application to postpone under consideration, the affidavits upon which it was founded disclosed no time at which it was probable that the attendance of the absent witness could be secured. This is an essential element in such application, as the motion can only be granted where it appears that the attendance of the witness can be procured within a reasonable time. As to the exceptions to the admission of evidence, it might be sufficient to state that the learned judge charged every proposition submitted by the defendant as to the law of the road, after the latter had been notified by the court that that question would be treated as matter of law.

The evidence of custom was entirely irrelevant to the facts of this case. The plaintiff's testimony tended to prove a most malicious trespass, and the defendant's evidence, if true, showed that he had nothing whatever to do with the happening of the accident. There was no room for any question of negligence. The defendant either intentionally drove into the plaintiff, or he did not. If he did not, then the plaintiff, under the evidence, could not recover. It is true that the question of negligence was submitted to the jury and the charge was therefore more favorable to the defendant than he was entitled. The judgment appealed from should be affirmed, with costs.

J. F. DALY and VAN HOESSEN, JJ., concurred.

Fogg agt. Fisk.

SUPREME COURT.

Fogg agt. Fisk.

Examination before trial — Sufficiency of affidavit under section 372, subdivision 4, of the Code.

Where an affidavit for the examination of a defendant before trial details the circumstances as to which proof will be required, which it is expected the defendant will be able to give in such a manner as to establish to a reasonable certainty its materiality, followed by an expression of belief that the examination and testimony of the defendant relative to the issues are both material and necessary to the plaintiff for the prosecution of the action, the requirements of the fourth subdivision of section 372 of the Code are sufficiently complied with.

First Department, General Term, June, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order directing the examination of the defendant as a witness before trial.

Wheeler H. Peckham, for appellant.

John E. Dos Passos, for respondent.

DANIELS, J. — The affidavit on which the order was made very fully complies with all the requirements prescribed by section 372 of the Code, unless it may be that contained in the fourth subdivision of this section. And the appeal has been taken for the reason that the affidavit was considered defective in this respect. That subdivision requires it to be shown by the affidavit that the testimony of the person to be examined is material and necessary for the party making the application, or the prosecution or defense of the action. And by the affidavit detailing the circumstances as to which proof will be required, which it is expected the defendant will be able to give, the materiality of the evidence desired to be obtained has to a reasonable certainty been established,

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and the minute statements made upon this subject are followed by the further statement that, as deponent is advised by his counsel and verily believes, "the examination and testimony of said defendant Fisk relative to the issues herein are both material and necessary to the plaintiff for the prosecution of this action and for the trial thereof." From these statements it may reasonably be inferred that a *bona fide* intention exists on the part of the plaintiff to obtain the evidence of the defendant for the purpose of producing and using it as a part of the proof of his case upon the trial of the action. It would undoubtedly have been better if this intention had been expressed in more direct terms, but as it may be gathered from the statements which have been made the plaintiff is entitled to the benefit of such a construction. It is undoubtedly true that the exercise of the authority in question should be carefully guarded, for in a large majority of instances where the testimony of the adverse party is taken under such an order the object is simply to discover what he may be able to state as the facts of the controversy, without any intention whatever to read the evidence upon the trial. And that practice it was not the purpose of this provision of the Code to permit. But from the statements made in this affidavit it may reasonably be concluded that the object of the party is to obtain evidence in support of his own case, without which he will not be able to proceed to the trial of the action. In this respect it differs from those relied upon in support of the appeal, for in *Beach agt. The Mayor, &c.* (4 *Abb. N. C.*, 236) the object was to ascertain the names of witnesses who might be expected would be produced upon the trial; and in *Chapin agt. Thompson* (16 *Hun*, 53) it was to discover simply what the defendant would probably swear to; and in *Creek agt. Corbin* (33 *Hun*, 176) no fact or circumstance showing the examination to be material or necessary was specified. The present case stands in favorable contrast with those which were determined by the courts in these and other instances.

Sine agt. Smith.

It may be that as to some of the matters to which the examination is expected to be directed that the defendant will not be obliged to answer. But if the examination should take that range it will be the province of the court, when the testimony is taken, to afford the witness the protection he may be entitled to under the rules of law applicable to the subject. The order should be affirmed, with the usual costs and disbursements.

BRADY, J., concurs.

COURT OF APPEALS.

LOUIS SINE and others, respondents, agt. CLINTON H. SMITH,
appellant.

THOMAS BOYD and others, respondents, agt. CLINTON H. SMITH,
appellant.

Attachment — Junior attaching creditor — Necessary conditions to the right of a subsequent attaching creditor to initiate a proceeding to vacate a prior attachment — Insufficiency of affidavit — Code of Civil Procedure, sec. 682.

Where a subsequent attaching creditor seeks to vacate a prior attachment upon the property of the insolvent debtor, there must be proof of a subsequent valid levy upon the same property covered by the prior attachment, and the affidavit of the attorney for the moving creditor that an attachment against the property of the defendant was granted in his client's suit and the warrant was duly issued to the sheriff, who had by virtue thereof attached the property of the defendant, and that the said attachment was in force and the action pending, is not sufficient for that purpose.

It appeared that after the prior attachments were issued, and apparently before the attachment of the moving creditor, an agreement in writing was entered into between the plaintiffs in the prior attachments and the assignee of the insolvent debtor, by which the said plaintiffs impliedly abandoned any attempt to perfect a levy upon the property of the debtor, in consideration of an agreement by the assignee to hold a certain sum in his hands and to pay it over to the plaintiffs in the prior attachment suits in case they eventually obtained judgment in said suits; and the sheriff made affidavit alleging not only that he had not levied upon or acquired a lien upon any property by virtue of said attachments, but that he had never been able to discover property of the defendant in such attachments liable to be levied upon.

Sine agt. Smith.

Held, that as it is thus conclusively shown that neither the prior or subsequent attaching creditor has any lien upon any property belonging to the debtor, and the moving creditor has no legal interest in the question as to the validity of said prior attachments, he has not brought himself within the requirements of the Code entitling him to move to vacate them.

Decided, June, 1883.

Otto Horwitz and *Daniel Clark Briggs*, for plaintiff and respondents.

Alexander Blumensteil and *Adolph Ascher*, for subsequent attaching creditors.

RUGER, C. J. — In each of the above entitled actions the appellant, who was a junior attaching creditor, sought to set aside and vacate prior attachments obtained by the respective respondents and levied upon the property of the defendant, Clinton H. Smith, an insolvent debtor. The motion was founded upon the alleged insufficiency of the affidavits upon which the prior attachments were allowed, and the allegation that the appellant had acquired a lien by virtue of a subsequent attachment upon the same property covered by the prior attachment. The only proof of the latter fact was contained in an affidavit made by the appellant's attorney, and entitled in the above actions, reading as follows: "That he is the attorney for the plaintiffs in an action brought in this court, in which Nicholas Schroeder and Henry C. Seavers are plaintiffs and the above named defendant is defendant; that on or about the 17th of March, 1882, an attachment against the property of the defendant was granted in said action by Hon. CHARLES H. VAN BRUNT, one of said justices, and the said warrant duly issued to the sheriff of the city and county of New York, who has, by virtue thereof, attached the property of the said defendant; that the said attachment is in force and said action is now pending; that prior to the issuing of the same and on or about the 9th day of March, 1882, an attachment was granted in the above action against the prop-

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erty of the defendant, and by virtue thereof the sheriff of the city and county of New York attached the property of the said defendant, being the same property attached by the attachment in the case in which deponent is plaintiff's attorney; that the attachment herein constitutes a prior lien to that referred to herein."

The question was raised in the court below that the affidavit furnished no sufficient evidence of the fact that the appellant had acquired a lien upon the same property covered by the prior attachments.

We think, for several reasons, that the point was well taken. It does not appear by the affidavit quoted which attachment was first levied upon the property in question. The date of the respective levies is not given, and the last clause of the affidavit purporting to furnish this information is indefinite and equivocal. The only proof of either of the levies in question is contained in this affidavit of the attorney, and he does not therein disclose the source of information upon which his statements are predicated. He does not even state that the attachment was duly issued, or that the several levies were duly made. Such an affiant does not necessarily have knowledge of, and cannot be presumed to know, the several facts attempted to be established by his affidavit in this case. Their existence depends not only upon the official action of several persons acting independently of each other, but also upon the legal sufficiency of the papers upon which their action was based. It is difficult to see how an attorney can acquire such knowledge of the several facts required to be proved on this motion as entitles him to give legal evidence of their existence.

Proof of a subsequent valid levy upon the same property, covered by the prior attachment, is a necessary condition to the right of a subsequent attaching creditor to initiate a proceeding to vacate the prior attachment (*Code of Civil Procedure*, sec. 682). Until this fact is established by legal evidence he is a mere stranger, having no right to intervene. The opinion of an attorney that a lien has been secured,

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although put in the form of an affidavit, falls short of the evidence required to establish the jurisdictional fact entitling a general creditor to interfere in the disposition of his debtor's property.

In *Ruppert* agt. *Haug* (87 N. Y., 144) and *Steuben County Bank* agt. *Alberger* (78 N. Y., 252), the party intervening was a judgment creditor, and his lien was secured by a levy upon execution. A manifest distinction has always been made between the position of judgment and general creditors. The authorities referred to by the appellant do not support the propositions to which they were cited.

But a still more serious objection to this motion is disclosed by other undisputed facts. After the prior attachments were issued, and apparently before the attachment of the moving creditor had come into the sheriff's hands, an agreement in writing was entered into between the plaintiffs in the prior attachments and the assignee of the insolvent debtor, by which the said plaintiffs impliedly abandoned any attempt to perfect a levy upon the property of the debtor in consideration of the agreement upon the part of the said assignee to hold the sum of \$10,000 in his hands and to pay it over to the plaintiffs in the prior attachment suits, in case they eventually obtained judgment in said suits, and said attachments had not in the meanwhile been vacated and set aside. This agreement is supplemented by the affidavit of the sheriff, holding each of the several attachments referred to in these proceedings, verified on the 7th day of April, 1882, and alleging not only that he had not levied upon or acquired a lien upon any property by virtue of either of said attachments, but that he had never been able to discover property of the defendant in such attachments liable to be levied upon.

There is no legal evidence in the case tending to controvert either the agreement or the facts stated in the affidavit of the sheriff. The affidavits of the several attorneys produced by the moving creditors stating that the sheriff did levy upon the property under said attachments without disclosing their

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means of knowledge, or the time when, or the property upon which the pretended levy was made, amount simply to the opinions of the affiants and do not constitute sufficient proof of the fact alleged to raise a question of evidence as to its existence.

It, therefore, conclusively appears that neither the appellant nor the respondent in this appeal have liens either upon the same or upon any property belonging to their mutual debtor, and that the appellant has no legal interest in the question as to the validity of said prior attachments. Such attachments do not stand in the way of the levy of the appellant's attachments upon any property which he may discover liable to be seized thereon. The appellant can have no interest in the agreement made between the assignee of the debtor and the prior attachment creditors for the reason that the only obligation of the assignee thereunder is to the prior attaching creditors, and such obligation cannot inure to the benefit of other parties. The sheriff has never had possession of or any interest in the moneys thereby agreed to be retained and paid over by the assignee, and the only effect of that contract is to create a liability upon the part of the assignee to the prior attaching creditors upon the happening of the contingencies therein provided for. The sheriff can maintain no action upon, and has no rights under, such agreement so far as his attachment proceedings are concerned. The appellant's interest in the property of his debtor can be reached or secured only through his process in the hands of the sheriff, and that is ineffectual to reach a right of action secured by contract to the prior attaching creditors alone. It thus appears quite evident that the appellant has not brought himself within the requirements of the Code entitling him to move to vacate a prior attachment.

The order must therefore be affirmed, with costs.

All concur, except ANDREWS, J., absent.

Stamm agt. Bostwick.

SUPREME COURT.

EDWARD STAMM, respondent, agt. GEORGE H. BOSTWICK,
appellant.

*Injunction affecting realty — When may be issued — Code of Civil Procedure,
sections 608, 1638.*

Where, in an action brought under section 1638 of the Code of Civil Procedure to compel the determination of a claim to the property adverse to that of the plaintiff, it appeared that the defendant was actively interfering with the possession by plaintiff of the premises in controversy, an injunction may be issued under section 608, and that immediately following it.

First Department, General Term, June, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order denying a motion to dissolve an injunction.

Lewis Johnson, for appellant.

Paul Fuller, for respondent.

DANIELS, J. — This action is brought under the authority of section 1638 of the Code of Civil Procedure, which authorized a person who has been in actual possession of real estate, or whenever he and the person from whom the estate has been derived have held possession for a term of three years under the circumstances therein mentioned, to maintain an action to compel the determination of a claim to the property adverse to that of the plaintiff. And it is clearly contemplated by the provisions enacted to control the proceedings in the action that the plaintiff should be continued in the possession during the pendency. For that reason, where there is danger of his possession being unlawfully disturbed or molested in the meantime, an injunction may be issued under section

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608 of the Code of Civil Procedure, for the case will then be one where the disturbance of his possession during the pendency of the suit would produce injury to him. And it appears by the affidavit sustaining the application for the injunction that the defendant not only designed but was actively interfering with the possession of the premises in controversy. And as that has not been denied the case was clearly one for an injunction within the section last referred to and that immediately following it. The action is not within the cases which have been decided relating to the right of the tenant to restrain by injunction summary proceedings brought to recover possession of demised premises, for that was not its principal object. The purpose of the suit was to determine the conflicting claim of the defendant to the property in controversy, and the restraint imposed upon his proceeding was incidental only to the complete accomplishment of the purposes of the action, and for that end the injunction was entirely proper. It was also carefully guarded by the direction requiring the deposit of the rents with the Union Trust Company to the credit of the action, and accordingly no possible injury can be sustained by the restraint imposed upon the defendant. It was claimed in his behalf that as a recovery of rent was had in his favor in the court of common pleas against one of the tenants, and the plaintiff was present in the court during a portion of the trial, that his claim of title had in that manner been virtually decided against him. But this position cannot be maintained for he is not a party to that action, and the mere circumstance that he was present observing the proceedings without the right to produce witnesses or cross-examine those sworn on behalf of the defendant will not affect him by the result of the trial.

The order in the case should be affirmed, together with ten dollars costs besides disbursements.

DAVIS, P. J., and BRADY, J., concur.

Smith agt. Sturgess.

SUPREME COURT.

WILLIAM B. SMITH, appellant, agt. GEORGE WILLIAM STURGESS,
respondent.

Contract to sell real property—Vendor and vendee—Meaning of the words “stores and premises”—Seller bound to prove on trial that on day and place specified in contract he was ready and willing to perform the same as therein specified—Purchaser need not perform contract because seller offered to pay the money value of fixtures that had been taken away.

The plaintiff contracted to sell and the defendant to purchase certain property, under the general description in the contract of “store and premises;” and plaintiff represented that he was offering the premises for sale just as they then appeared, with the water-closets, basins, &c., as parts of and belonging to the property to be sold. Between the making of the contract and the meeting of the parties for the purpose of executing the conveyance, the building had been dismantled by the removal by the tenant, who owned them, of the gas and water pipes, and other fixtures, so that it was at that time in an untenable condition: *Held*, that though no fraud was shown on the part of the vendor, and though the fact that the fixtures belonged to the tenant was not known to him, a verdict for the defendant in this action to enforce the contract was properly directed, for the plaintiff was bound to show upon the trial that his assignor was, on the day and place specified in the contract, ready and willing to perform the contract by a compliance with its terms, which he could only do under the circumstances by conveying the property substantially in the condition in which it was when it was sold. Nor could he claim the performance on the part of the purchaser by offering to pay to him the money value of the fixtures that had been taken away.

First Department, General Term, July, 1883.

Before DAVIS, P. J., BRADY and WRIGHT, JJ.

APPEAL from a judgment, entered at circuit upon verdict for defendant by direction of the court. The facts sufficiently appear in the opinion.

Johnson, Tilton & Brodsky (Albert Mathews, of counsel), for plaintiff, appellant, made and argued the following points:

I. The alleged “fixtures” having been put up for temporary

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accommodation of the tenant by himself with intent to remove the same belonged exclusively to the tenant, were personal property, not part of the realty and could not be sold or conveyed by another (*Taft* agt. *Horton*, 53 *N. Y.*, 377; *McRea* agt. *Central Bank of Troy*, 66 *N. Y.*, 495; *Sisson* agt. *Hibbard*, 75 *N. Y.*, 546; *Globe Mills Co.* agt. *Quinn*, 76 *N. Y.*, 25).

II. The alleged declaration of Trask, if made, that these so-called "fixtures" should be deemed part of the premises could not convert this personal property into realty (*McKeaze* agt. *Hanover Ins. Co.*, 81 *N. Y.*, 38).

III. The mere fact of actual personal possession by the tenant was legal notice to all purchasers of his rights as owner of the so-called "fixtures" upon the premises, and the defendant's contract was made subject to these rights (*Grimstone* agt. *Carter*, 3 *Paige R.*, 437; *De Ruyster* agt. *St. Peter's Church*, 2 *Barb. Ch.*, 555; *Bank of Orleans* agt. *Flagg*, 3 *Barb. Ch.*, 316; *Laferty* agt. *Moore*, 33 *N. Y.*, 658; *Livingstone* agt. *Arnoux*, 56 *N. Y.*, 521).

IV. The court erred on the trial, first, by allowing the introduction of parol evidence in conflict with the letter of the contract of "false representations," and, secondly, by refusing to allow the plaintiff to submit to the jury the question of fraud or bad faith on the part of the seller in the premises (*Koehler* agt. *Adler*, 78 *N. Y.*, 291; *Justice* agt. *Lang*, 52 *N. Y.*, 328; *Hart* agt. *H. R. R. Co.*, 80 *N. Y.*, 623).

J. C. Julius Langbein, of counsel for defendant, respondent, made and argued the following points :

I. The testimony as to what was said between the seller and the defendant and his witnesses was properly admitted. It was in explanation of the intent and meaning of the parties of the words "stores and premises" in the contract of sale (*Heinnemann* agt. *Rosenbach*, 39 *N. Y.*, 98; *Tunk* agt. *Brigaldi*, 4 *Daly*, 359; *Petitt* agt. *Shepherd*, 32 *N. Y.*, 97;

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Collender agt. *Dinsmore*, 55 *N. Y.*, 200; *Lawrence* agt. *Gallagher*, 73 *N. Y.*, 613).

II. The rule is a general one, that upon a sale of the freehold any and all fixtures attached to it will pass, unless there is some express provision to the contrary. For here the presumption is strong against the vendor who should expressly reserve from sale such articles set up in the freehold as he wished to remove for himself, since a vendee is not asked to make a purchase of lands blindfold (*Shouler on Personal Property*, p. 150).

III. Under all the authorities, not only at equity but at law, the proofs in the case entitled the defendant to a judgment in his favor (*Jenkins* agt. *Fahy*, 73 *N. Y.*, 355; *Hubbell* agt. *Van Schoening*, 49 *N. Y.*, 326; *Merchants' Bank* agt. *Thomson*, 55 *N. Y.*, 9).

IV. The direction by the court to the jury to find a verdict, under the evidence, for the defendant, and the denial by the court, on plaintiff's motion, to allow him to go to the jury as to the credibility of defendant's witnesses as to the seller's representations regarding the fixtures, was not error for which the judgment should be reversed (*Hodge* agt. *City of Buffalo*, 1 *Abb. N. C.*, 356; *Elwood* agt. *Western Union Tel. Co.*, 45 *N. Y.*, 549; *Sheridan* agt. *The Mayor*, 8 *Hun*, 430; *Kavanaugh* agt. *Wilson*, 70 *N. Y.*, 177; *Nicholson* agt. *Connor*, 8 *Daly*, 212; *Gildersleeve* agt. *Langdon*, 75 *N. Y.*, 609).

DAVIS, P. J.—When the contract for the sale of the property described therein was made, all the fixtures subsequently removed by the tenant were in the building, and in such condition that if they had belonged to the vendor, the plaintiff's assignor, the title to them would undoubtedly have passed to the defendant under the general description in the contract — "store and premises."

The fact that they belong to the tenant under such circumstances that he was entitled to take down and remove them, was not made known to the purchaser. From the evidence

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in the case, that fact was evidently not known to Trask the vendor. But if it were, it clearly appears that he had not in any way advised the purchaser of the fact. On the contrary, the evidence shows that he represented that he was offering the premises for sale just as they then appeared, with the water and gas pipes, water closets, basins, &c., as parts of and belonging to the property to be sold. As between him and the purchaser the contract must be held to be an agreement for the sale of those fixtures or such of them as would pass as part of the real estate as much as any other part of the property, and that that was the understanding of the parties appears beyond dispute, both from what was said at the time the premises were shown, and from what was said at the time they met at the office of Mr. Bailey for the purpose of executing the conveyance. Between the making of the contract and the date of that meeting, the building had been dismantled by the removal of the gas and water pipes, water closets, and the various fixtures enumerated, so that it was at that time in an untenable condition.

Upon this state of facts the defendant was not bound to receive a conveyance of the property in its altered condition as performance of the contract into which he had entered, and it was upon this ground, doubtless, that the learned judge at circuit directed the verdict for the defendant.

The answer alleged fraud on the part of Trask, the vendor, as a defense. The case in our judgment failed to show any fraud on his part, and if the disposition depended upon that question we should feel it our duty to hold that the court should at least have sent the question of fraud to the jury. But it does not necessarily depend upon that question, for the plaintiff was bound to show upon the trial that his assignor was, on the day and place specified in the contract, which was the time of the meeting at the office of Mr. Bailey, ready and willing to perform the contract, by a compliance with its terms, which he could only do, under the circumstances, by conveying the property substantially in the condition in which

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it was when it was sold. If he could not do this, it was no excuse that he was not aware that the tenant in possession was, in fact, the owner, and had the right to remove things apparently appurtenant and belonging to the premises as parts thereof, and the removal of which had seriously diminished their value; nor could he claim the performance on the part of the purchaser by offering to pay to him the money value of the fixtures that had been taken away. To such an offer it was a sufficient answer to say, as the defendant did, that he had bought property in a tenantable condition, fit to be rented without delay, and was not bound to take the same in a condition which would require the restoration of appurtenances and fixtures before the same could be rented.

The defendant had a legal right to refuse to accept the conveyance in the condition in which it then was, and the court had not, in an action of this kind, any power to intervene and require him to accept the same upon compensation for the diminution in its value by the removal of the fixtures. The action is at law, and must stand upon strict legal rights. Upon the evidence, as it stood uncontradicted, there was really no question for the jury, and no reason for submitting the question of fraud or good faith on the part of the vendor.

We see no reason for interfering with the verdict on any exceptions taken to the admission of testimony during the progress of the trial.

All that was said and done antecedent to and at the time of making the contract was properly admitted as bearing upon the question of fraud, and although the defendant failed to establish the allegation of fraud, it does not follow that the verdict should be disturbed if the evidence is admissible as a part of his effort to establish it.

If all that is objectionable is stricken out of the case there would still remain the controlling fact that the plaintiff's assignor had agreed to convey the store and premises which contained valuable fixtures appurtenant to the land, and form-

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ing part of the building, at the time of the offer of the conveyance had been taken down and removed by their owner, so that the store and premises were in material respects not the same property agreed to be purchased.

We think the judgment should be affirmed.

BRADY, J., concurs.

ALBANY OYER AND TERMINER.

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THE PEOPLE agt. JOHN FITZPATRICK.

The Albany jury law — Its unconstitutionality, so far as it relates to grand jurors, reaffirmed — Code of Civil Procedure, section 1041.

Chapter 532 Laws of 1881, amending section 1041 of the Code of Civil Procedure, in so far as it provides for the selection of grand jurors in and for the city of Albany, is unconstitutional.

When objection is made to the impanneling of grand jurors under such law, it must be sustained.

A grand jury obtained by methods which the constitution forbids cannot be a valid grand jury under the constitution.

Valid objections made to a grand jury before its organization, but then reserved and not decided, and renewed after indictment, must be held effectual to quash the indictment.

May, 1883.

N. P. Hinman and Andrew Hamilton, for defendants.

*D. Cady Herrick, district-attorney, for the people.**

* At the Albany oyer and terminer of May, 1883, the same objections, which were made to the organization of the grand jury in the above causes prior to such organization being perfected, were also made in the same manner in behalf of several individuals, who had been recognized there to appear and answer any indictment which might be found against them, by Mr. Edward J. Meegan, and were by him most elaborately and fully argued. As the Petrea case was then pending on appeal, decision in those cases was reserved.

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WESTBROOK, J.—On the 7th of May, 1883, prior to the attempt to organize a grand jury for the court of oyer and terminer of the county of Albany, which on that day began its session, and before the individuals who had been summoned to attend such court in the capacity of grand jurors, had been accepted or sworn as such, each of the above named defendants who had severally given bail to answer any indictment which might then be found, by counsel, objected to such individuals collectively and severally as grand jurors, and moved to set aside and discharge the entire number, because each and every one had been obtained pursuant to the provisions of chapter 532 of the Laws of 1881, entitled “An act to amend section one thousand and forty-one of the Code of Civil Procedure,” and not a single one had been drawn or obtained in the manner prescribed by the Revised Statutes, from a list of names made out and selected as therein required.

The counsel for the defendants insisted that the act of 1881, so far as it professed to provide for the selection and obtainment of grand jurors in the county of Albany, was unconstitutional and void, because it was a local law, applicable to the county of Albany only, and, therefore, forbidden by article 3, section 18, of the state constitution, which prevents the passage by the legislature of a private or local bill for “selecting, drawing, summoning or impanneling grand or petit jurors,” unless the same had been reported to the legislature (*sec. 25 of same article*) “by commissioners who have been appointed pursuant to law to revise the statutes,” and that this bill had not been so reported.

The district-attorney conceded the facts upon which the objection was based, and admitted that the persons attending the court as grand jurors had been obtained pursuant to the act of 1881, and not in the manner prescribed by the Revised Statutes; and also that chapter 532, of the Laws of 1881, had not been reported to the legislature by the commissioners appointed to revise the statutes. The district-attorney, however, insisted that the men present, and each of them, were

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competent to serve as grand jurors, and had been drawn from the only box or list of grand jurors kept or made in and for the county of Albany, and had been duly summoned by the sheriff of the county, and that the objections made should be overruled.

It was then agreed between counsel in open court, that the objections made on the part of the defendants to the proposed grand jurors should not then be disposed of, and that if an indictment was found against either of the defendants or both of them, that the questions involved in such objections should be argued and disposed of in the same manner as if argued and decided before the organization of the grand jury.

An indictment, or what purports to be one, has been presented against each of the defendants, and the objections made prior to the attempt to organize the grand jury have been submitted to the court, after arguments for a decision. It is somewhat difficult to say what should be the form of the order to be made in these cases, if the objections are sustained, as the decision must be after indictment. Passing this difficulty, however, for the present, the question: What should have been the decision of the court upon the objections if they had been disposed of when made? will be first considered.

The doubt as to the constitutionality of the Albany jury law (*chap. 532 of the Laws of 1881*), upon which the objections to the organization of the grand jury were based, has been settled by the court of appeals, in the case of *People agt. Petrea*, a full report of which in the general term will be found in 64 *Howard*, 139, and in the court of appeals, 65 *Howard*, 59. That court held (*see opinion of ANDREWS, J., on p. 79*) "that the act so far as it relates to the selection and drawing of grand jurors, is unconstitutional." It was so decided (an offer to prove that the law, as a bill, had not emanated from the commissioners to revise the statutes, having been improperly rejected) upon the assumption that it had not been reported from such commission. That question of fact—the source and origin of the law—is eliminated from these cases

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by the concession of the district-attorney, who admits that as a bill it did not originate with, nor was it reported from such commission. The discussion of the questions involved in these objections must, therefore, proceed with the distinct recognition of the fact, that the act of 1881, so far as it relates to the mode and manner of obtaining grand jurors in Albany county is unconstitutional and void. A corollary, which necessarily follows from the previous fact, must also be borne in mind, and it is this, that as the law is a violation of the constitution, because it attempts to obtain grand jurors in a mode forbidden by that instrument, that each and every person attending the court to serve as a grand juror was forbidden to serve as such by the fundamental law. This corollary follows, or else the constitution is a dead letter. Of what avail is a constitutional prohibition against legislation if the machinery of such confessed unconstitutional legislation can still be used and upheld against the party whom it affects? To me, the proposition seems strange, that a body of men, or any men, selected and obtained by methods forbidden by the constitution, no matter how fair, impartial, or well qualified for the functions which they assume they may be, can be organized into a grand jury and place in jeopardy the life and liberty of the citizens. If this can be done, then constitutional guards for the most sacred rights of man can be stricken down by a single blow. To this grave question — can a citizen avail himself in any way of a constitutional provision which forbids men, obtained in a certain manner, from serving as grand jurors? — we are brought, and it deserves the most careful attention.

It has already been stated that the court of appeals has decided that the law, by which the men who are objected to as grand jurors were obtained, was unconstitutional and void. This fact is conceded by the district-attorney, but he also insists that the decision in the Petrea case establishes the doctrine that, no matter by what methods or process the men summoned as grand jurors are obtained, though in fact their presence is secured by modes forbidden by the constitution, so

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long as individuals they possess the statute qualifications of grand jurors, the accused is without remedy. If this proposition has been held by our court of *dernier* resort, it must be adopted as the law of these cases, without any regard to the individual views of the judge presiding in this tribunal. Has any such doctrine been held in the Petrea case? To that question discussion will now be directed.

Prior to the decision in the Petrea case it was supposed by the judge writing this opinion, that to constitute a valid grand jury, it was not sufficient that a number of men competent to serve as members thereof assembled in the presence of the court, and were accepted by the tribunal as competent grand jurors, but that as the selection of men to serve as such was most important for the protection of the rights of the citizen, that the selection of those in attendance must have been in conformity with law. The upright administration of criminal justice would seem, at least, to depend very largely upon the observance of every safeguard imposed by law for the choice of grand jurors, in order to secure their absolute impartiality and freedom from all bias, or sinister motive. If called upon to define what a legal grand jury is, the answer required would seem to me to be this: A body of men selected, chosen and summoned according to and in the manner prescribed by law, to serve as grand jurors before and at a competent court, and by such court impaneled, sworn and charged to inquire in regard to crime committed within their jurisdiction, and to present all offenders against the law in the mode and manner defined by it. The selection of its members is, as has already been said, a most important and vital point to be observed; and the Code of Criminal Procedure has expressly declared (*sec.* 229) that "*the* mode of selecting grand jurors is prescribed by special statutes." What is the effect of this provision other than the utterance of a legislative command that "*the* mode of selecting grand jurors prescribed by special statutes" shall be followed?

When a method of procedure is pointed out as "*the*" one to

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be adopted, is not every other excluded by force of the maxim "*Expressio unius est exclusio alterius*?" If such mode has not been followed, and the selection of the members of a grand jury has been not only without the authority of law, but in defiance of its positive commands (for section 18 of article 3 of the constitution to be effective must operate as a prohibition against the obtainment of a grand jury under a local statute), can a presentment made by a body of men thus obtained accuse any person of a crime so as to subject him to a trial therefor? When the act of 1881 was adopted by the legislature and approved by the governor, there was in full force in the county of Albany a system for selecting and obtaining grand jurors — that of the Revised Statutes — which that act was designed to overthrow and supplant. That attempt failed, as the court of appeals has held, because it was a violation of the constitution. When, therefore, old and valid laws still operative for the obtainment of a grand jury are disregarded, and a new, unlawful and forbidden enactment is obeyed in its selection, what possible vitality or life can an organization thus set on foot obtain? See in this connection the opinion of the chancellor in *People agt. White* (24 *Wend.*, 539, 540, 541, 542) as to the distinction between *de facto* officers of a tribunal "duly organized," and of the "*de facto* officers of an unconstitutional and therefore illegally organized court;" also, *Hildreth's Heirs agt. McIntyre's Devisee* (1 *J. J. Marshall*, 206, 207, 208, 209); also *Green agt. State* (59 *Md. R.*, 125) in which the court of appeals of that state, per IRVING, *J.*, say: "The general method prescribed for drawing juries is mandatory, and substantial compliance with the provisions thereof in respect to the selection and drawing of jurors is necessary to make the jury a legal one; and unless the selections are made by the judge in the manner pointed out by the statute, exception at the proper time and in the proper way may be successfully taken to a jury improperly chosen or drawn; otherwise the statutory provisions would be wholly nugatory;" also, *Dutell agt. The State* (4 *Greene's Iowa R.*, 125), which was

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to review the denial of a motion "to quash the indictment on the ground that the grand jurors who found it were not selected according to law." The court say, per GREENE, J.: "But it is urged by the attorney-general, that the defendant cannot raise this objection after the indictment is found, but that he should have challenged the panel of the grand jury as provided by section 2882 of the Code. This course may be adopted with propriety by a defendant held to answer for a public offense; but can it be expected that citizens at large, against whom there is no imputation of offense, are required to appear and challenge the panel of grand jurors, or be forever precluded from raising an objection to their selection or authority to act? It is true, as a general rule, that when the indictment is duly exhibited in open court, and indorsed 'a true bill,' it is evidence that it was duly found by a legal grand jury. But when the records of a county show that the grand jury were not legally selected, and had no authority to act, it is evidence of a higher grade, and shows that the indictment could not have been found, exhibited and indorsed by legal authority;" also, *Kitter* agt. *The State* (likewise reported in 4 *Greene*, 291), and see opinion of court on formation of grand jury, pages 292, 293; also, *State* agt. *Symonds* (36 *Maine*, 128), which was a case presenting the identical question of that of *Petrea*. The defendant had filed a plea in abatement to the alleged indictment, that it had been found by a grand jury not selected as the statute provided. The plea was overruled, and he was required to answer upon the merits. He pleaded not guilty, and on trial was convicted. The supreme court reversed the conviction, upon the ground that the grand jury, not having been legally selected, could present no valid indictment. The court, per HOWARD, J., saying, among other things: "Every indictment must be found by a grand jury *legally selected*, and duly constituted and competent for the purpose;" also, *Doyle* agt. *The State* (17 *Ohio*, 222). In that case, an indictment purported to have been found by fifteen grand jurors, which was the exact

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number requisite to make a grand jury. To the alleged indictment the prisoner pleaded a special plea, that one of the fifteen grand jurors did not have the statute qualifications of grand jurors. To this plea there was a demurrer which was sustained by the trial court. On writ of error the supreme court of Ohio reversed the conviction, and the court, per READ, J. (*pages 224, 225, 226*), after stating the organization of the grand jury, said: "Hence no indictment in this case was ever found by a grand jury, because there was no grand jury to pass upon it. Hence that which purports to be an indictment was no indictment, and the party charged could not be put upon trial to answer. It should have been quashed or set aside as a nullity. But it is said the objection comes too late. No objection can come too late, which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights. The doctrine of waiver has nothing to do with criminal prosecutions. No person can be put upon his defense on the charge of crime, or be convicted of crime, except in the exact mode prescribed by law. * * * What an indictment is, is matter of law. Who shall constitute a grand jury, how it shall be summoned, composed and organized, is all matter of positive law. No man can, by his consent or will, constitute a grand jury. No man, by express consent, can confer jurisdiction upon the court to try him for crime. No man, by express consent, can make that an indictment, authorizing the court to try that which, in fact, is no indictment;" also, *Barney agt. The State* (*reported in 12 Smedes & Marshall, 68*), in which the high court of error and appeals, of Mississippi, decided in the same way in a precisely similar case; also, *White agt. The Commonwealth* (*6 Binney, 179*), in which a conviction for murder was reversed because the precept to summon the grand and petit jurors omitted to order the latter to be summoned from the county in which the court was held, and the return of the sheriff did not affirmatively show that the trial jurors were summoned from such county; also, *Hawkins'*

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Pleas of the Crown (book 2, chap. 25, secs. 16, 26, 28). It is useless, however, to pursue this discussion. It has progressed thus far without intending in the slightest degree with a fault finding spirit to criticise the opinion of the court of appeals in the Petrea case, which will be adopted and followed; but simply and only to show the extent to which the position of the learned district attorney goes, who occupies the extreme ground that the accused has no right to object *at any stage of the proceeding* to the fact that a so-called grand jury has been organized for his prosecution in a mode forbidden by the constitution. The proposition is certainly startling, but it needs examination. Has the court of appeals held in the Petrea case that if the objections, which were made after indictment, had been made prior to the organization of the grand jury, they would have been unavailing?

Judge ANDREWS (65 *How.*, 69) says: "The jury which found the indictment was a *de facto* jury selected and organized under the forms of law. The defect in its constitution, owing to the invalidity of the law of 1881, affected no substantial right of the defendant. We confine our decision upon this point to the case presented by this record, and hold that an indictment found by a grand jury of good and lawful men, selected and drawn under color of law, is a good indictment by a grand jury within the sense of the constitution, although the law under which the selection was made is void. It will be time to consider the extreme cases suggested by counsel when occasion shall arise."

It is not now proposed to discuss, whether or not a *de facto* grand jury can exist at all, when its existence as organized, by the methods and machinery employed, is a violation of the constitution; nor to maintain the proposition that a body upon which power is conferred must, to exercise that power, be organized and formed as the law directs, and that while the possessor of an office may as a *de facto* officer wield the power of the office, yet there can be no such thing as a *de facto* court or jury, when organized without and against the law;

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nor to consider whether or not a grand jury can be said to be selected and drawn under "color of law," when the constitution expressly says its members shall not be selected and drawn in the mode and by the machinery they were in fact drawn and selected. All these questions must, by this tribunal, be deemed settled, and they are only now suggested to submit in the most respectful manner to the court of *dernier* resort, whether or not the opinion in the Petrea case is carried too far? But it is insisted, that the court of appeals has not yet decided that if a body of men has been obtained in an illegal manner for a grand jury, that an objection, taken by a person whose case is to be considered by it before the organization of the grand jury is made, would be unavailing. That court has held, that after an indictment has been found by a body of men who, one and all, possess the statute requirements of grand jurors, organized and accepted by a competent court, without objection, as such, that an objection to the manner of their selection is unavailing. They have held that there may be a *de facto* grand jury, whose work when completed may be valid; but they have not said that it was the duty of the court to create a *de facto* grand jury by the machinery of a void statute, when its attention was drawn to the fact, and objection made to its being done. Further than this, as has been stated, has not been held. On the contrary, the court say: "We confine our decision upon this point to the case presented by this record;" and also, "It will be time to consider the extreme cases suggested by counsel when occasion shall arise." What "the extreme cases * * * suggested by counsel" were is not known. Certain it is, that this motion presents an extreme case, for the court is asked by persons who were under recognizances there to appear and to answer to any indictment which might be found, and, therefore, interested vitally in the organization of a grand jury, to set aside and not place in such a body men who had been selected by machinery and in a manner which the law forbade. Can a judge or court, to which such an appeal is made, disregard

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it? Can a judge presiding at a court, who knows that the individuals there attending as grand jurors, have been selected under an unconstitutional and void statute, and not in the "mode" prescribed "by special statutes," still in force, when his attention is called to what has been done, disregard the appeal, and proceed to organize the grand jury without the slightest regard to the constitution, which he has sworn to support? These are certainly questions as grave as any which can be propounded to a tribunal for decision. An executive officer may appoint an individual to fill an office which is vacant, to do which he has no authority, and yet the officer may, as a *de facto* one in possession of the office, effectually wield the functions thereof; but would that fact justify the executive in making an appointment which he knew he had no power to make? It is possible, for the court of appeals has so decided, for a court to organize a grand jury by the machinery of an unconstitutional law, and an indictment by such a body, when found without objection, is good; but what possible protection does that fact afford to a court for organizing it contrary to the constitution, when it knows that by so doing it violates that instrument? Can it be gravely argued that a court, which is informed by the decision of the highest tribunal of the state, that the individuals then attending to serve as grand jurors have been chosen and obtained by unconstitutional and forbidden methods, with which opinion its own, on full and careful examination, agrees, must, with open eyes, deliberately and against an objection plainly made, accept such men as grand jurors and proceed to organize a grand jury, to the end that a *de facto* body of that character should be formed? Grant that the work of such a body can be effectual, yet can that relieve the court which has, in defiance of law, conferred upon it as a body that power? It is one thing to hold that authority to act has been given, but it is quite a different thing to hold that the power conferred should, under the law, have been conferred. If the court of last resort decides that on objection made to the organization of a grand jury, this court

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can legally and properly uphold and use the machinery of a law to obtain the members thereof, which the legislature was forbidden to pass, and disregard legal enactments for their obtainment which are still in force and unrepealed, then this court, as now organized, will cheerfully obey, for the opinions of that court make the law for the guidance of the lower tribunals. Until, however, that court has so held, the responsibility of overruling objections so clear, and thus plainly and palpably violating the constitution of the state, cannot be assumed.

The learned district attorney has also argued that the objections made to the organization of the grand jury amount to a challenge "to the panel or to the array of the grand jury," which is forbidden by section 238 of the Code of Criminal Procedure, and that therefore they cannot avail. If the true construction of this section is that which is claimed, it is then proper to consider what force the section itself can possibly have. The constitution of the state (*art. 1, sec. 6*) has said: "No person shall be held to answer for a capital or otherwise infamous crime" (with certain exceptions therein contained, none of which, however, being applicable to these cases), "unless on presentment or indictment of a grand jury." It is true that the constitution has not defined what a legal grand jury is, and the attempt has been made in the prior part of this opinion to show, both on reason and authority, that it means a body of men, the members of which have been selected, chosen and summoned according to the provisions of law regulating such selection, choice and summoning. There is, however, another argument upon this subject worthy of a separate statement, for from its force there seems to me to be no escape, and it is this: While it is true the constitution has not said how a grand jury shall be obtained and organized, in order to find an indictment which shall be sufficient and valid to compel a party "to answer for a capital or otherwise infamous crime," yet it has declared what shall *not* be a lawful grand jury to accomplish that result. The

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eighteenth section of its third article, by its prohibition to the legislature from passing a local bill for "selecting, drawing, summoning or impanneling grand or petit jurors," has expressly forbidden its organization under any enactment which disregards that constitutional prohibition. By no possibility can it be said that the constitution intends to call that a legal grand jury, which it has, if due force be given to all its provisions, directly declared shall not be one. It is true that section 18 of article 3 is an enactment by the people, subsequent to section 6 of article 1, and that prior to the adoption of such section 18 of article 3, there was no constitutional declaration to the effect that a grand jury, obtained in any particular way, was not a lawful grand jury, and incapable to find a valid indictment, to which the party indicted could be compelled to answer; but the two now form parts of the same one instrument and must be construed together as the present command of the sovereign power to the tribunals which it has created. It is not necessary, in the present cases, to demonstrate that the pretended law, under the so-called machinery of which the individuals, at whom the objections in these cases were aimed, were selected, was repugnant to and therefore made void and of no effect by the eighteenth section of the third article of our state constitution. That problem, if one it ever was, was worked out in the opinion written in the Petrea case, and with the conclusion there reached — that such pretended law was no law, so far as it relates to the grand jury — the court of appeals has agreed and stamped upon it the declaration that it is null and void. Regarding and considering, then, the two sections of the constitution (*art. 1, sec. 6, and art. 3, sec. 18*) together, what have we for our guidance but a single command by the fundamental law, declaring to this court, and to all courts of the state, you shall not place a person upon trial "for a capital or otherwise infamous crime, * * * unless on presentment or indictment of a grand jury," and you shall not obtain such grand jury under the machinery of a local bill passed by the

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legislature for "selecting, drawing, summoning, or impanneling" its members. The constitution must mean this or nothing, for of what possible practicable force can its prohibition to the legislature be, unless it is extended to the courts, which alone are to use the machinery of laws, which the legislature enacts. Without this construction of the fundamental law, the singular spectacle is presented of a prohibition to the legislature from passing a bill, and yet when passed, having all the effect of a valid law, because freely used and made effective by the courts. This court, having been informed by the decision of the court of appeals that the individuals before it, who have been summoned to act as its grand jurors, are there in violation of the constitution of the state, cannot, when objections plainly call attention to that fact before their acceptance as grand jurors, organize them into a grand jury; and any statute, which forbids the defendants from raising objections of the character presented, or the court from considering them when made, must and will be regarded as of no force or effect. The court is, however, well satisfied that the author of the Code intended no such legal impossibility. Its author, whose fame is world-wide, used the words "panel or * * array of the grand jury" in no such sense as is attributed to them. He used them in their legal sense, and not to designate men who could not possibly be called grand jurors, but only such as were present, who, having been obtained by legal methods, could be called a "panel or * * array of the grand jury." When such a body is present, the right of challenge is limited, but he did not intend to prohibit the court from ascertaining whether or not it had such a body before it. The objections presented are not a challenge in the sense used in section 238, but they go further, and insist that there is no material present, which can make a "panel" or "array," and an inquiry to ascertain the truth of such allegation is not forbidden.

There is also another answer to the objections of the district attorney, and it is this: While section 238 of the Code of

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Criminal Procedure has declared: "There is no challenge allowed to the panel or to the array of the grand jury," it, nevertheless, also provides that "the court may, in its discretion, at any time discharge the grand jury and order another to be summoned" for several causes therein specified, of which the following is one: "That the requisite number of ballots was not drawn from the grand jury box of the county." This provision recognizes a legal direction in regard to the number of ballots to be drawn, when a grand jury is to be selected, and the existence of a place of deposit of the ballots containing the names of persons who have been selected to serve as grand jurors, which is called "the grand jury box of the county." There was no grand jury box in the county of Albany, there had been no selection in such county of persons to serve as grand jurors, and there had been nothing whatever done therein for the obtainment of a grand jury which the law required. On the contrary, the provisions of a void and unconstitutional act were obeyed and followed. In view of these conceded facts, and the words of the section of the Code, which have been given, if the court has a discretion to set aside the panel for non-compliance completely with the provisions of law for the obtainment of grand jurors, how should that "*discretion*" (if it can be called by that name) be exercised, when it is conceded that no list of grand jurors has been made, that not a single ballot containing the name of a person selected according to law to serve as such, has been placed in "the grand jury box of the county," and consequently not one ballot drawn therefrom? This question would seem to admit of only one answer, and it is this, a wise exercise of judicial discretion requires a court, whenever it plainly appears that every safeguard of law in the selection of grand jurors has been disregarded, and new and unconstitutional methods of choice has been employed to set aside the supposed panel, and to order a new panel to be summoned in accordance with existing and unrepealed statutes. No other

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order can be made, if plain statutes are to be obeyed, and the organic law is of force.

From what has been said it is plain what judicial conclusion would have been reached, if the objections made to the composition and organization of the grand jury had been argued and pressed to a decision when made. By consent of counsel, however, the motion was not then submitted, but such omission to ask for a decision upon the objections, was with the express understanding and stipulation, on the part of the district attorney, that if the defendants were indicted they should be entitled to the same order to which they would have been entitled had the decision been made prior to the organization. The object of that stipulation undoubtedly was to prevent the failure of the grand jury, to which many cases were to be presented against parties who had made no objection to the constitution thereof, and indictments against whom would, if found, be valid under the decision in the Petrea case.

With some doubt as to what the order should be, the conclusion reached is, that the indictment against each of the defendants should be quashed. They have been found by a grand jury, to the organization of which valid objections were made, and which would have been sustained if they had then been pressed; and as such objections were not then determined, upon the stipulation of the district attorney that the court could, after indictment, make such an order as it would have originally made, and as the order would have been one which would have prevented the finding of an indictment against either of the defendants by the body as subsequently organized, because such organization would not have taken place, it follows that what was done by such body against the defendants should be set aside and held of no effect.

The conclusion just stated is also the legal one, for another reason. Objections are now made, not only after an indictment found, to the organization of the grand jury that presented it, and which should be disregarded because of the decision of the court of appeals in the Petrea case; but such

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objections preceded the organization of the body called a grand jury, and how, when then made, the case should be decided, that of Petrea does not determine. Even though the district attorney had not stipulated that the court should decide the questions upon their merits, without regard to the fact that an indictment had been found, as an original question it must be held that valid objections made to a grand jury before its organization, but then reserved and not decided, and renewed after indictment, must be held effectual to quash the indictment.

It is proper to say in conclusion, that the questions which have been discussed ought to be settled before the county of Albany is subjected to the expense and costs of many trials, if that be possible, and the orders to be entered will be in such shape and form, both in these cases and in several others in which Mr. Meegan and other counsel have raised the same objections, as may be necessary to review them, and to preserve the rights of the people. What should be the form of the orders is not now determined. If the orders to be made are final and incapable of review (and upon that point no opinion is expressed), whilst regretting that fact, it cannot, after the legal conclusion which, after most careful thought and study, is too clear for a single doubt. Rights guaranteed by the constitution are too sacred to be trifled with. They cannot be brushed away by calling them "technicalities," and insisting that in doing so "no harm has been done." It is impossible to legally affirm that "no harm has been done," when something guaranteed by law has been refused, for it is a proposition, as old as the law, that every violation of constitutional right in a criminal case is of itself conclusive evidence that substantial injury has been wrought. It is impossible to judicially know of the criminal guilt of an individual, except by and through legal and constitutional methods of procedure, because until the ascertainment of the contrary by such methods, the presumption of innocence is the shield of every man against punishment. Courts should be zealous to uphold, and not ingenious

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to get around or over constitutional enactments; and to no class of such enactments is this remark more applicable than to those which are designed to secure proper and impartial jurors, both grand and petit. If the judges of England had been subtle in their endeavors to take away such constitutional protections from the accused, then the learned Blackstone could not have effectively answered Montesquieu's assertion "that because Rome, Sparta and Carthage have lost their liberties, therefore, those of England must, in time, perish," by the argument he uses in his commentaries (*Book 3, p. 397*), that Montesquieu "should have recollected that Rome, Sparta and Carthage, at the time that their liberties were lost, were strangers to the trial by jury." In making that answer a profound truth was uttered, but such answer can only be true where judges carefully preserve every safeguard of jury trials. The presentment and trial by jury are the boast and pride of America as they are of England. They should be most carefully and sedulously guarded, and the labor in preparing this opinion, as well as that in the Petrea case, will be amply rewarded if either or both shall contribute a mite to uphold and protect the guaranties which the constitution gives to every citizen for his protection without regard to his antecedents, or to the misfortunes which surround him.

SUPREME COURT.

JOHN FISHER agt. J. C. JULIUS LANGBEIN and GEORGE F. LANGBEIN.

Action against attorneys for false imprisonment — Not liable for error of court where there is jurisdiction of the person and of the subject-matter and the process is regular upon its face.

Where a court has jurisdiction of the subject-matter of the action and of the person, and the papers presented by the attorney are regular upon their face, and the court after consideration, and after hearing and acting judicially upon the papers, grants the application, and the same

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is afterwards set aside and vacated upon the ground of error in the court, such error of the court is not only a protection to the attorney, but to every other person for acts done under such erroneous process, and the attorney is not liable therefor.

First Department, General Term, August, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from a judgment at a special term before the court and jury dismissing the plaintiff's complaint. The action was brought to recover the sum of \$30,000 damages against the defendants, who are attorneys and counselors at law, for false imprisonment. The complaint alleges that the imprisonment was malicious, unlawful and wrongful. No malicious acts on the part of the defendants against the plaintiff were proven on the trial, and Mr. justice LAWRENCE in dismissing the complaint at the special term in his opinion stated that if any wrong was done to the plaintiff in the case, it seemed to him to have proceeded from the error of a judicial tribunal for which an attorney and counselor could not and ought not to be held liable; and that it appeared from the testimony in the case that not only was the course of the Messrs. Langbein predicated upon the action of the court of common pleas, but it was certainly sustained by the judicial determination of two justices of the supreme court, presiding justice DAVIS and judge BRADY.

For the pleadings in this action, and a more complete statement of the facts, together with the opinion of the special term justice and the briefs of the counsel, see the case reported in 62 *Howard's Reports*, 238.

Henry Wehle, Charles H. Jordan and Charles Wehle, for plaintiff, appellant.

C. Bainbridge Smith, of counsel.

Jesse K. Furlong, for defendant, respondent, J. C. Julius Langbein.

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George F. Langbein, attorney for defendant, respondent,
George F. Langbein.

Ex-Judge Albert Cardoza, of counsel.

BRADY, J. — The appellant was a member of the "Kranken Unterstutungs Verein Deutsche Tren and Eungkeit," and commenced an action in the court of common pleas against the individual members of the association to dissolve it, and applied for an injunction to restrain the disposition of its funds. Upon such application he was met by the affidavits of forty-two members of the society, represented by J. C. Julius Langbein, as attorney of record. The plaintiff, through his counsel, thereupon charged that these forty-two members who had made affidavits, being Germans and unacquainted with the English language, were misled in signing and swearing to their affidavits containing averments prejudicial to his application, and it was agreed that the truth or falsity of this charge should determine whether he should or should not pay the referee's fees. If the forty-two members, or a majority of them, swore that they made the statement which appeared in the affidavit, the plaintiff was to pay the fees. An order of reference, containing that provision in substance, was thereupon entered by consent. The learned justice who made the order in a subsequent proceeding, said in reference to it: "Knowing the expense and vexation to parties of reference to determine disputed facts arising in the course of a motion, I endeavored to dissuade counsel from his course, but the course was taken upon the strict agreement as to paying the expense which is embodied in the order of September 17, 1878, directing the reference."

The referee, after a bitter contest, and it seems a protracted and tedious litigation, found in favor of the defendants. His fees were \$130. Due notice was given that his report was ready for delivery. The plaintiff, however, neglected to take it up; whereupon, upon application by the defendants' attorney, an order was made requiring the plaintiff to pay to the

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referee his fees within three days, or show cause why he should not be committed, and the injunction vacated, and the motion for injunction and the appointment of a receiver denied, and his proceedings stayed until such fees were paid. The plaintiff was heard upon the return of the order to show cause; and the learned judge presiding expressed, in an elaborate opinion, his views upon the subject, and determined that the commitment should issue, which was accordingly done on the 4th day of December, 1878. On the 5th day of December, 1878, the plaintiff obtained a writ of *habeas corpus*, which was returnable at a special term, and an order was made on the seventh day of December, two days subsequent, dismissing it, with costs, and remanding the plaintiff. The opinion of the court was expressed upon the subject, and declared that the relator desired a reference for a particular purpose, and it was granted on his stipulating to pay the referee's fees in a certain contingency; that the event had occurred, and the court had directed the payment of the fees, in accordance with the compact made; that he refused or declined to pay, and for this contempt was committed. And it was held that the power of the court to commit under the circumstances admitted of no doubt, that the expensive process was adopted as a favor to the relator on his promise to pay, and he was bound to keep it.

On the 27th day of December, 1878, the plaintiff obtained another writ of *habeas corpus* which was also dismissed and the plaintiff remanded to jail.

It appears further that in March, 1879, the general term of the court of common pleas reversed the order of commitment upon the ground that the right to do so of the clerk of the defendants' attorney's, who made the demand for the payment of the referee's fees, was not exhibited. "But," the court added, "in view of the bad faith exhibited on his side, we shall not award costs to the plaintiff; and we make it a part of the terms of reversal, that the plaintiff shall stipulate not to bring any action on account of his imprisonment. The stipulation.

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must be handed up with the proposed order of reversal. The stipulation was not given, and the court affirmed the order. The plaintiff then appealed to the court of appeals, where the order was reversed. Subsequently this action was brought against the defendants, as the attorneys and counsel for defendants in the original suit, to recover damages for false imprisonment. Upon the trial the facts thus stated appeared, with others to which it is not deemed necessary to refer, and the complaint was dismissed.

The action is predicated upon the proposition that the process of commitment was absolutely void, and it is supposed that the court of appeals, on the appeal just referred to, so declared. It is not understood that the opinion proceeded to any such length. The court said at the conclusion of the opinion delivered:

"So far as appears in the papers before us, the sole purpose of the proceeding was to compel the payment for the benefit of the referee, as the defendants were not liable to pay him. The plaintiff ought to pay the referee, but this is not the remedy to compel such payment.

"Before a party can be imprisoned for contempt, a reasonably clear case, upon the law and the facts, should be made, and it is quite certain that such a case was not made here."

And the court then said: "Therefore, without passing upon the particular points determined at the general term, we are of opinion that the order of the special and of the general term should be reversed, with costs on the appeal to this court, to the appellant."

The effect of the stipulation upon which the court below proceeded, and which influenced the judgment of the court on the first application to be discharged, does not seem to have received any particular consideration in the court of appeals, although it is regarded a very vital element in the whole proceeding.

The court of appeals is, therefore, regarded as having declared the process to have been erroneously issued. The jurisdic-

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tion of the court of common pleas in the action pending before it cannot be questioned, nor can the power of the court to punish by commitment in a proper case. The court of appeals held simply that the process was erroneously issued, and there is no suggestion anywhere that it was absolutely void. And having been erroneously issued, there can be no question that the imprisonment under it could be justified; and more particularly because it was issued upon an application to the court and allowed after due deliberation by the court to which application for it was made.

In reference to the right to justify under erroneous process, see *Day v. Bach* (87 N. Y., 256), in which the subject is fully and elaborately discussed; and as to the effect of process issued upon due deliberation, see *Landt v. Hilts* (19 Barb., 283).

For these reasons, in addition to those which were assigned by the learned justice at the time of the dismissal of the complaint, it is thought that the judgment should be affirmed.

DAVIS, P. J., and DANIELS, J., concur.

SURROGATE'S COURT.

In the Matter of the judicial settlement of the account of ISAAC F. BROWN, executor, &c., of DEBORAH ORSER, deceased.

Jurisdiction of surrogate — Code of Civil Procedure, sec. 2743.

Surrogates have power, under the Code of Civil Procedure, to hear and determine controversies in regard to the title to, or any question concerning a legacy or distributive share under a will.

Westchester county, August 1883.

DEBORAH ORSER died in 1879, leaving a last will and testament dated September 10, 1877. The will was prepared by Isaac F. Brown, a nephew, and the testatrix, after bequeath-

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ing various legacies, gave and bequeathed to said Isaac F. Brown and to Margaret Miller the residue of her estate, real and personal, to be equally divided between them. Said Brown was appointed one of the executors of the will, and was also one of the two subscribing witnesses to the execution of the same. At the time of said execution, and ever since, he has resided in the town of Ossinny, in this county, and so continues to reside. The will was proved in the surrogate's court of said county in March, 1880, and admitted to probate on the testimony of said Brown and the other subscribing witness.

The testatrix left her surviving no husband or descendant, and her only heirs-at-law and next of kin are a sister and several nephews and nieces, children of deceased brothers and of a deceased sister. On the filing of the executor's account of proceedings some questions were raised upon these facts and upon others which are sufficiently stated in the opinion.

Francis Larkin and *N. H. Baker*, for the executor.

John G. Miller, for Margaret Miller, one of the residuary legatees.

Charles M. Hall, for Mary Dubois and others, next of kin.

COFFIN, S. — As the next of kin claim that the provision of the will in favor of the executor is void by statute, and that they, as such, are entitled to their several distributive shares of the amount of the bequest attempted to be made to him, and as this claim is disputed by the executor, it becomes necessary to determine whether this court has, under the provisions of the Code of Civil Procedure, any jurisdiction in the premises. I do not perceive anything in the third sentence of section 2743 preventing me from passing upon the question. It strikes me that the words "distributive share" have been inadvertently inserted, as it is impossible to conceive how the validity of a distributive share can or cannot

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be disputed. The sentence implies the existence of such share. If the share exist, it is because it is fixed by statute, and if it be disputed, it is disputing the statute. There seems to be no provision prohibiting the surrogate from determining a controversy as to whether a person claiming to be the owner of, and entitled to, a distributive share is so entitled. I think we have no right to interpolate words which would have the effect of depriving him of a power heretofore exercised. Striking out those words and he is simply deprived of the jurisdiction, as he has been hitherto, of trying the validity of a debt or claim which is disputed.

Section 71 of the Revised Statutes (93), and section 2743 of the Code, so far as this question is concerned, do not differ very materially. The former provided that the surrogate in his decree should settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom it should be payable and the sum to be paid. The latter, that where the validity of a debt, claim or distributive share is not disputed, or has been established, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same. This, of course, means that the surrogate must determine all questions other than that of the validity of the debt, &c., and he is directed by his decree to determine to whom the same is payable and the sum to be paid. If there arise a question on either subject, surely his decree cannot determine it, unless he try to decide it. How, therefore, when there is a dispute as to a right to a distributive share, or as to the amount of any such share, can he escape or evade the duty of trying and deciding it? See *Riggs* agt. *Cragg* (89 N. Y., 491), reported since this opinion was prepared.

The long controversy in the courts, as to the power of a surrogate to try a disputed debt or claim, was finally put at rest by the court of appeals in *Tucker* agt. *Tucker* (4 Keyes, 136), denying such power. That decision was based upon the reasoning of HARRIS, J., in *Magee* v. *Vedder* (6 Barb., 352).

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That able jurist viewed all the statutory provisions relating to the mode of recovering debts against deceased persons, the notice to creditors, the presentation of debts or claims to the executors, and the provisions for reference in case of dispute, &c., and he pronounced the scheme of the revisers in that regard admirable. It will be readily seen that there was and is no scheme as to legacies or distributive shares, no provision for publication, for presentation or for reference in case of dispute as to person or amount.

I am not aware that the power of a surrogate to determine a controversy as to the person of a legatee or distributee, or the amount to which either was entitled, has ever been questioned; but the books are full of cases where it has been done and sanctioned by the appellate courts. Even in *Magee* agt. *Vedder* the learned judge quoted, with strong expressions of approbation, the language of surrogate Ogden in regard to the power of a surrogate to try a disputed debt. He said: "When, therefore, the seventy-first section declares that the decree of the surrogate shall settle and determine all questions concerning any debt, etc., it does not mean that he is to determine the validity of the debts, but their priority, the amount due upon them, and to whom they belong, whether to the original creditor or to his assignee or his executor," etc.

Among other cases, showing a recognition by the higher courts of the power of the surrogate to try and determine the question of a right to a distributive share, I may mention the case of the will of Isaac M. Singer, where the sole question tried before me, and where some \$15,000,000 was involved, was whether Mrs. Foster was his widow and entitled to a distributive share of his estate as such. Able and distinguished counsel, among whom was a former judge of the court of appeals, resisted her claim upon the merits, and never questioned the power of the surrogate to try it. The same case on appeal may be found under the title of *Foster* agt. *Hawley* (reported in 8 Hun, 68). Again, in the matter of the estate of John A. Merritt, who died intestate, leaving assets amount-

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ing to over \$1,250,000, the only question presented for determination was, who were entitled to distributive shares, it being decided by this court which of the numerous claimants were, and which were not entitled to such shares. The power of the surrogate to determine was not questioned by any of the astute counsel engaged, nor was such an objection raised in the appellate courts, the case being reported in 14 *Hun*, 551, under the title of *Adee* agt. *Campbell*, and also in 79 *New York*, 52. In *Hurton* agt. *Proal* (3 *Bradf.*, 414), the right of the uncle to a distributive share was disputed and was determined by the surrogate. Like jurisdiction was exercised by him in the case of *Doughty* agt. *Public Administrator* (3 *id.*, 151, 219; 4 *id.*, 28, *affirmed by court of appeals*, 23 *N. Y.*, 9). The same may be said of the case of *Hallett* agt. *Hare* (5 *P'aige*, 315, 1835), and *Rose* agt. *Clark* (8 *id.*, 574, 1841).

It is, perhaps, unnecessary to mention other cases in order to show that it was the uniform and unchallenged practice of surrogates under section 71, sanctioned by the superior courts, to hear and determine such questions. Now, as I understand the rule as to construction of statutes, it is that where the law is settled by adjudications giving it a certain construction or effect, a mere change of phraseology made in a revision of it should not be deemed or construed as a change in the law, unless it evidently appears that such was the intention of the legislature (*Taylor* agt. *Delancy*, 2 *Cal. Cas.*, 143; *Goddell* agt. *Jackson*, 20 *Johns.*, 697, 722; *Matter of Brown*, 21 *Wend.*, 316).

It will be observed, in this connection, that the commissioner's notes to sections 2742-3 relate exclusively to the power of a surrogate to try a disputed claim against the deceased. No other meaning to the word "claim" is suggested there or in the decisions.

Another rule as to construction is, that a long and uninterrupted practice under a statute is regarded as good evidence of its construction (*Fort* agt. *Borch*, 6 *Barb.*, 60, 73; *based upon 5 Cranch*, 22).

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It is quite apparent from the notes of the commissioners that the legislative intention was simply to conform the statute to the decision in the case of *Tucker* agt. *Tucker*, regarding a disputed debt. At most, there is nothing in the Code to forbid surrogates from deciding a controversy in regard to the title to, or any other question concerning a legacy or a distributive share, any more than there was in the Revised Statutes. It having, therefore, been the unbroken and unquestioned practice of the surrogates' courts for upwards of half a century to hear and determine such controversies, and the sections of the Code referred to having in no way circumscribed the power, its exercise by this court will be continued until it shall be otherwise instructed by an appellate tribunal. Hence I pass to the consideration of the other questions involved in this case.

The executor claims that he is a residuary devisee and legatee by virtue of the sixth clause of the will, which is as follows: "I give and bequeath to Isaac F. Brown and Margaret Miller the remainder of my estate, to be equally divided between them, of both real and personal," and that by virtue of this clause he is entitled, on this accounting, to one-half of the remainder of the fund, amounting to about \$6,000, after the payment of the debts and general legacies. This claim is resisted upon the ground that as he was one of the two witnesses to the will, residing in this state and competent to testify, without whose testimony the will could not have been proved, he is precluded from taking any more than his distributive share of the personalty, or the share of the realty which would have descended to him in case the will had not been established (2 *R. S.*, 65, *secs.* 50, 51). These sections declare such a witness to be competent, and that he may be compelled to testify, so that other intended beneficiaries might not be deprived of what was sought to be given them. I think the object of the law is two fold; first, to render the subscribing witness competent who would not have been so otherwise, and, second, to guard against fraud in the prepara-

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tion and execution of wills. The first is now perhaps obviated by recent statutes, but the latter remains. As the law now stands he is generally, as a party, a competent witness, but the effect as declared by section 51 is still the same, that section remaining unrepealed, and one of the reasons for its enactment still existing. Before the Revised Statutes were adopted, a devise to a subscribing witness to a will was wholly void (*Sharpsteen agt. Tillon*, 3 Cow., 651), and such subscribing witness could not testify on the probate. The cases cited by the learned counsel for the executor do not seem to me to be in point.

It is, however, objected that this court cannot pass upon the question because it involves a construction of the will. Were the objection taken applicable, I should feel constrained to disregard it, for the reason that in most cases the court is compelled to construe wills in order that it may obey the directions of the statute to distribute the surplus remaining "to and among the creditors, legatees," &c., "according to their respective rights, and to determine to whom it is payable, and the sum to be paid by reason thereof," &c. But I do not deem this a case of construction at all. We are not here groping after the meaning of the testator, who has used language that is obscure. The court is simply asked to apply a plain provision of the statute, in order to determine to whom one-half of the residue of the personal estate of the deceased is to be paid. Applying this provision it is determined that it must be paid to the next of kin of the testatrix, as prescribed by law for the distribution of intestates' estates, except that in such distribution the executor must be excluded, as he will already have received his full distributive share of the estate, as if she had died wholly intestate.

The executor's counsel insist that the will could have been properly proven without the testimony of Mr. Brown. In this I think they are mistaken. The law upon the subject will be found concisely stated in *Redfield's second edition of the Law and Practice of Surrogates' Courts* (202 et seq., and cases cited).

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One William Orsor died in 1864, leaving him surviving, as his only heir-at-law and next of kin, six brothers and sisters, and leaving a will, in and by which, among other things, he directed the residue of his real and personal estate to be converted into money, and such money to be invested in good securities for the benefit of his sisters Deborah, Sarah and Matilda during their natural lives, each to receive an equal share of the interest accruing thereon; and failed to make any disposition of the remainder. On the accounting of this same Isaac F. Brown, the executor of that will, it was ascertained and decreed that the fund so created amounted to \$3,856.23, and the decree ordered the executor to invest it and divide the interest between the three sisters equally. Subsequently Sarah, one of the three, died, leaving a will, of which said Brown was also executor. On his accounting in her estate he charges himself with one-third of the \$3,856.23, as having received it, and the decree directed the balance of \$4,088.99, found to be in his hands, after the payment of all claims to be paid to him as her residuary legatee. That is presumed to have been done.

The question as to whether the provision for the three sisters, in William Orsor's will, was in conflict with the statute against perpetuities, was not raised; no appeal was taken from either decree, and their provisions must, therefore, in this proceeding, be regarded as binding upon the parties.

As by the decree in the William Orsor estate the fund was to be invested and the income to be equally divided among the three sisters as provided by the will, they became tenants in common of the income, and the survivor or survivors could not take the share of the income of any one who might die, but each survivor could receive only her one-third (*Strong* agt. *Strong*, 4 *Red. R.*, 376), and as by the decree in the Sarah Orsor estate, the principal of the fund producing her income was directed to be paid to her residuary legatee, and as Matilda Orsor, the only survivor of the three, is still entitled to the income of one-third, all that we have to deal with in this pro-

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ceeding in this respect is the principal of the fund which reduced the income of Deborah Orsor. Her interest in it passed under her will, as it vested in remainder at once on his death in the next of kin of William, of whom she was one, and he, as to it, died intestate. Hence, it follows that, as Deborah left assets sufficient to pay all her general legacies, her claim on the fund as next of kin of William, with accrued interest, became a part of the residuum attempted to be given by her will to Isaac F. Brown and Margaret Miller, which bequest as to Brown being, as we have shown, void, except that he may take the share of her estate to which he would have been entitled had she died intestate (2 *R. S.*, 65, *sec.* 51, and *Code Civil Pro.*, *sec.* 1868). The residue, including interest from Deborah's death, must be equally divided among the other next of kin of the testatrix as provided by the statute of distributions. This fund came into the hands of the executor of William Orsor and as it, on Deborah's death, became a claim in his hands, as her executor, against the estate of William, he must be regarded as having collected it and as now holding it as her executor.

I think the executor is chargeable with interest on the moneys drawn out of the savings banks and deposited with his own funds at the Sing Sing National Bank, except on the sums paid out as legacies. He supposed himself entitled to one-half of the residuum, and acted innocently in the matter, but that will not excuse him from liability for interest to those having a legal right to it; but I think it should be reckoned now at the rate of four per cent only.

The executor not being very accurate in the use of words, seems to have called legacy "dower" in the vouchers he took when he paid legacies. I am, therefore, inclined to receive them as sufficient; and also to allow the payment made to the guardian of the Finch children. If there is anything still due on account of the remainder of the dower interest of Rubama Brown, deceased, the executor is still liable for it to him.

I do not regard the fact of the statute rendering the bequest

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to Brown void, by reason of his being a witness to the will, as in any manner affecting the bequest to Margaret Miller. The will is to be regarded as if the one-half of the residuum were given to her and the other half left undisposed of. Such seems to me to be the effect of the statute. There can be no difficulty in making the separation.

Thus the chief questions arising in the case are disposed of.

- Any others that may have been overlooked will, on attention being called to them, be disposed of on the settlement of the decree, of which at least four days' notice should be given.

Costs of all parties to be paid out of the fund.

SUPREME COURT.

HENRY CUPFER, respondent, agt. MARY FRANK, appellant.

Execution, when may issue — Code Civil Procedure, sections 1365-1375.

Where, in an action in the nature of a creditor's bill founded upon a judgment and execution issued and returned *nulla bona*, it appeared by affidavit that the judgment was for deficiency in foreclosure; that the judgment of foreclosure was rendered September 25, 1876; the referee's report of sale made October 25, 1876, showing a deficiency, for which the judgment was docketed on January 22, 1878:

Held, that such docketing was the entry of judgment within the meaning of the Code, and that the issuing of the execution on the 13th of December, 1882, was within five years, it being intended by sections 1365 and 1375 to limit the time within which execution may issue, of course, upon any judgment to five years after the right to issue the same has fully accrued.

Whether, when the assets consist of a claim against an insurance company, arising upon a policy of insurance, in the name of defendant, upon the life of her husband, such interest is assignable and can therefore be reached by execution, *quære*.

First Department, General Term, August, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

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APPEAL from order denying motion to vacate injunction.

A. R. Dyett, for appellant.

Ezra A. Tuttle, for respondent.

DAVIS, *P. J.* — This is an action in the nature of a creditor's bill, founded upon a judgment and an execution issued and returned *nulla bona*, and it seeks assets of the appellant to be applied upon such judgment. The assets consist of a claim against the Mutual Life Insurance Company, arising upon a policy of insurance in the name of the appellant on the life of her husband. The only question that seems to have been presented at Special Term was whether the complaint shows an execution duly issued within five years from the time the judgment was rendered. The allegations of the complaint are sufficient upon that question to show the issuing of an execution within that time; but it is shown by affidavit that the judgment was for deficiency arising upon the sale of mortgaged premises in an action of foreclosure, and it is also shown that the judgment of foreclosure and sale was rendered on the 5th day of September, 1876, and that on the 25th day of October, 1876, the referee's report of sale was made in the action bearing date on that day, which shows a deficiency, for which the judgment was docketed on the 22d of January, 1878. If such docketing was the entry of the judgment within the meaning of the Code, then the issuing of the execution on the 13th of December, 1882, was within five years. The Code provides (*sec.* 1375) that executions may issue, of course, at any time within five years after the entry of the judgment, and by section 1365, that an execution against property can be issued only to the sheriff of the county in the clerk's office of which the judgment is docketed.

We are inclined to think that the court below was correct in construing these sections as authorizing the issuing of execution in this case. On the filing of the referee's report of deficiency the judgment declaring the liability of the

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defendants for such deficiency was not brought to a condition in which execution could issue; therefore something more was necessary to be done, and we are of opinion that the sections referred to of the Code are intended to limit the time within which executions may issue, of course, upon any judgment to the period of five years after the right to issue the same has fully accrued. In this case the right did not accrue until the judgment was duly docketed, and that not having been done until the time above named, the execution is shown upon the facts to have been issued within five years.

Another point is now urged which is in substance that the interest of the appellant in the policy of insurance or claim against the insurance company was not assignable, and therefore cannot be reached by execution. The circumstances of the case are peculiar, and the decisions referred to on the subject of the non-assignability of a married woman's interest in a policy are not in all respects analogous to those of this case. It may very well be held on the trial of this action that those cases control that question, but it would seem from what appears in the papers before us that restraining the assignment of the policy or claim can be of no special injury, provided the action is brought to trial with proper diligence, inasmuch as, if it be true that Mrs. Frank has no power to make any assignment of the policy or claim, she will not be harmed by having the injunction remain, while on the other hand, if she has such power, the plaintiff in the action might lose his remedy, if she were not restrained.

We are of opinion therefore, on the whole, that the injunction should not, on that ground, be vacated, but be allowed to remain until the trial of the action, in which this question of the assignability of the policy or claim can be finally determined.

DANIELS and BRADY, JJ., concur.

Grinnell agt. Church.

SUPREME COURT.

GEORGE B. GRINNELL agt. WALTER S. CHURCH and others.

Pleadings — Complaint — Answer — Sufficiency of answer.

The complaint was for the foreclosure of a mortgage charged with a bond accompanying the same to have been executed for a good consideration by defendant to plaintiff and delivered to him, it did not aver that plaintiff was the owner and holder of such bond and mortgage. The answer contained no general denial, but, first, a denial that plaintiff was the owner and holder of the bond and mortgage, and second, an averment on information and belief that plaintiff was not the real party in interest :

Held, first, that the denial contained in the answer that the plaintiff is not the owner and holder of the bond and mortgage is bad, because it is a denial of no averment of the complaint. It therefore makes no issue for trial. If the facts averred give no cause of action, the defendant must demur, or by alleging and stating new facts making a defense, he can on the trial test the sufficiency of the complaint by motion. But he cannot, by a denial of an unaverred fact, make an issue.

Second. As the complaint alleges the making and delivery of the bond and mortgage by the defendant to the plaintiff, the second allegation of the answer simply charging that the plaintiff is not the real party in interest is bad, because the answer, by not denying admits such allegation of the complaint, and avers no new fact, which, if true, avoids the effect of the admission.

Ulster Special Term, July, 1883.

MOTION by plaintiff for judgment on account of the alleged frivolousness of this answer. The complaint was for the foreclosure of a mortgage charged (with a bond accompanying the same) to have been executed for a good consideration by the defendant Church to the plaintiff, and delivered to him. It did not aver that the plaintiff was the owner and holder of such bond and mortgage.

The answer contained no general denial, but it contained, first, a denial that the plaintiff was the owner and holder of the bond and mortgage, and, second, an averment on informa-

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tion and belief that the plaintiff was not the real party in interest.

Marcus T. Hun, for plaintiff and motion.

Eugene Burlingame, for defendant and opposed.

WESTBROOK, *J.* — This motion only presents questions upon the legal sufficiency of the answer, and as to those the affidavit for a postponement of the motion has no relevancy.

First. The denial contained in the answer, that the plaintiff is not the owner and holder of the bond and mortgage is bad, because it is a denial of no averment of the complaint. It therefore makes no issue for trial. If the facts averred give no cause of action, the defendant must demur; or by alleging and stating new facts making a defense, he can on the trial test the sufficiency of the complaint by motion. But he cannot, by a denial of an unaverred fact, make an issue.

Second. As the complaint alleges the making and delivery of the bond and mortgage by the defendant to the plaintiff, the second allegation of the answer of the defendant simply charging that the plaintiff is not the real party in interest is bad, because, the answer by not denying admits such allegations of the complaint, and avers no new fact, which, if true, avoids the effect of the admission.

For these reasons the motion of the plaintiff must be granted, with ten dollars costs. As, however, the affidavit of the defendant shows that there may possibly be a defense, the order must provide that the defendant may, on the payment of ten dollars costs, in twenty days after the service of the order on this motion, serve an amended answer.

Matter of Hallenbeck.

SUPREME COURT.

In the Matter of ROBERT HALLENBECK.

Jurisdiction of the special sessions of Albany as to punishment of the crime of petit larceny — Punishment specified in section 15 of the Penal Code proper— Penal Code, sections 2, 7, 11, 15, 726, 528, 530, 531, 582, 585, 719, 726, 651 — Code of Criminal Procedure, section 717.

Where crimes are defined in the Penal Code and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in section 15 of such Code is proper.

The court of special sessions of the city of Albany have jurisdiction to impose a fine of \$500 upon a person convicted of petit larceny.

Special Term, August, 1883.

ROBERT HALLENBECK was convicted in the court of special sessions of the city of Albany of the crime of petit larceny and sentenced to pay a fine of \$500, or to imprisonment in the Albany penitentiary for 500 days, on the 29th day of May, 1883. On the thirteenth day of August the defendant obtained a writ of *habeas corpus* from justice LEARNED and asked for an order discharging the defendant from imprisonment on the ground that the court of special sessions had exceeded its jurisdiction in imposing the fine of \$500, and that the greatest fine that said court could impose was fifty dollars under section 717 of the Code of Criminal Procedure, or \$100 under the Revised Statutes.

George W. Smith, for defendant Hallenbeck.

D. Cady Herrick, district-attorney, for the People.

LEARNED, *J.*— In examining the question presented we must consider that the Penal Code is a general statute intended to define all (or nearly all) crimes and to provide for their punishment (*Secs. 2, 7 and 11*). There must be special offenses which are not touched by it. But in respect to well known.

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and familiar classes of cases the enactments of the Code are intended as substitutes for those which previously existed (*Sec. 726*). Section 528 defines at some length the crime of larceny. Sections 630 and 531 define the first and second degrees of grand larceny. Section 532 declares that every other larceny is petit larceny. These definitions are intended to take the place of those in 2 Revised Statutes, m. p. 679 (*Secs. 63 and 690; sec. 1*).

The Penal Code (*sec. 535*) declares that petit larceny is a misdemeanor. This must mean petit larceny as previously therein defined. Section 719 declares that an offense specified in this Code, committed after, &c., must be punished according to the provisions of this Code and not otherwise. Section 15 declares that a person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail for not more than one year or by a fine of \$500, or by both. Petit larceny is a misdemeanor. No other punishment is specially prescribed by the Code. The prisoner's crime was committed after the Code took effect, and is punishable according to its provisions.

The question is whether there is any other punishment specially prescribed by any statutory provision now in force. Section 726 of the Penal Code declares all acts inconsistent to be repealed so far as they impose any punishment for crime. And it is an obvious meaning of that section that punishments imposed by previous acts are to be repealed whenever they are inconsistent with the Code. The penalty imposed by 2 Revised Statutes, m. p. 690, section 1, is certainly inconsistent with that imposed by the Penal Code. It cannot be understood that the exception in section 15 was to take away the effect of section 726.

The argument of the relator is that whenever a punishment had been prescribed for a misdemeanor previously to the Penal

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Code which has not been expressly repealed, that remains still in force. Now, if we turn to 2 Revised Statutes, m. p. 697, section 40, we shall find a provision for the punishment of all misdemeanors of which the punishment is not prescribed by some other statutes. Therefore, according to the relator's argument, a punishment is specially prescribed for every misdemeanor. Now, therefore, every misdemeanor is excepted from section 15 of the Penal Code. This plainly is unreasonable. Again, the definitions of larceny in the Penal Code are unlike those in the Revised Statutes, therefore that part of section 1 (2 *R. S.*, m. p. 690), which defines petit larceny, is not in force. Why, then, the residue of the section? The relator's position, if correct, would seem to apply to some, perhaps many, other cases. For instance, section 651 (*Penal Code*) declares certain interferences with gas pipes to be a misdemeanor, but prescribes no penalty. This section is substantially the act of 1854 (*chap.* 109, *secs.* 1 and 2), by which the crime was declared and a penalty prescribed of six months' imprisonment and a fine of \$250. Are we then to understand that a violation of section 651 is not punishable under section 15 of the Penal Code, because there was a penalty in the act of 1854, and that in the absence of an express repeal of that act the provisions therein are still in force? Under such a construction, instead of having a complete system in the Code, we should be obliged to refer to numerous statutes to ascertain the penalties now in force. When crimes are defined in the Code and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in section 15 is proper. The other objection made under section 717 of the Code of Criminal Procedure is obviated by the special provision of section 68, subdivision 3 of the same Code, giving to the special sessions in Albany power to the extent possessed by the court of sessions in like cases.

The relator is remanded to the superintendent of the penitentiary to be held under the warrant and ~~mittimus~~.

Matter of Fook.

SUPREME COURT.

In the Matter of J. Fook.

Chinese seamen excluded under act of congress of May 6, 1882.

Under the anti-Chinese act, forbidding the coming of Chinese laborers to the United States (*act of congress of May 6, 1882*) a Chinese seaman is a "laborer" and prohibited from leaving his vessel to come ashore even for temporary purposes.

Special Term, August, 1883.

THIS is a writ of *habeas corpus* in the case of J. Fook, a Chinese sailor, who it is claimed was deprived of his liberty by Captain Samuel J. Rickard, on board the ship *Pembrokeshire*.

POTTER, J. — The respondent is required by the mandate of the writ of *habeas corpus* to bring the body of J. Fook, alleged to be imprisoned by the respondent, with the cause of such imprisonment. In obedience to such writ, the person is brought before the court, and the cause of such imprisonment is stated in the return to be, substantially, that the act of congress, approved May 6, 1882, forbids the coming of Chinese laborers to the United States or of their remaining therein, and such coming or remaining is declared by said act to be unlawful.

It is provided in said act that the master of any vessel who shall knowingly bring within the United States on such vessel and land, or permit to be landed, any Chinese laborer from any foreign port or place, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than \$500 for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year; but that this section shall not apply to the case of any master whose vessel being bound to a port

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not within the United States shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place. Provided that all Chinese laborers brought on such vessel shall depart with the vessel on leaving port.

The act also contains provision that certain United States officials shall furnish description certificates to every Chinese laborer in the United States at the time of the passage of the act, and for the period of ninety days thereafter, sufficient to identify him, whenever he may wish to leave the United States by land or water, and which certificate is required to enable him to re-enter and remain in the United States.

The master of all vessels arriving in the United States from any foreign port shall, at the time of delivering its manifest of cargo or of making report of its entry, and before permitting any Chinese passenger to land, deliver to the collector of customs of the district a list of all Chinese passengers, and before any Chinese passenger shall be allowed to land, the collector shall proceed to examine such passenger by comparing the certificates with such list and with said passenger, and no passenger shall be allowed to land from such vessel in violation of law. And every vessel whose master shall violate any of the provisions of said act shall be forfeited, and any Chinese person who shall be found unlawfully within the United States under the provisions of the act in question shall be removed to the country from which he came, by direction of the president of the United States.

It is further provided in said act that any person who shall knowingly aid or abet the landing in the United States from any vessel of any Chinese person, not lawfully entitled to enter the United States, shall be guilty of a misdemeanor, punishable by a fine, not exceeding \$1,000, and imprisonment for a term not exceeding one year.

It is plain from the provisions of the act above referred to that it is the purpose of the United States government to

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prevent the introduction into the United States of Chinese laborers; and the act itself defines a "Chinese laborer" to be both skilled and unskilled laborers, and Chinese employed in mining. The return made by the respondent shows that the petitioner is a Chinese laborer and that he was born and has resided at and shipped from the port of Hong Kong, in China, in June last, as such laborer on board a British vessel, of which the respondent is master, under articles or a contract to serve for a period of twelve months, and has been and is now so employed. The petitioner demurs to the return, thus admitting the truth of its allegations.

Upon this state of the law and facts, should the court command the respondent to allow the petitioner to land in the city of New York? To permit him to land would enable the petitioner to go at large in the United States, and to return to the vessel or not, according to his pleasure. The result would be a practical and effectual evasion of the law in question. I do not think a court or judge, whatever he may think of the policy of a law, should issue a mandate which, if carried into execution, would nullify a law of congress, subject the respondent to criminal prosecution, to be followed by fine and imprisonment, and render the petitioner himself also a violator of the law of congress and his contract to serve the respondent upon his vessel for twelve months.

With these views (which I have had no time to elaborate or to reduce to form), the writ must be dismissed and the petitioner remanded.

The People *ex rel.* McManus agt. Thompson.

SUPREME COURT.

THE PEOPLE *ex rel.* THOMAS McMANUS agt. HUBERT O. THOMPSON, commissioner of public works, and JOSEPH BLUMENTHAL, superintendent of incumbrances.

*New York (city of) — Public uses to which streets may be properly devoted —
Erection of poles for electric lights.*

The placing of poles necessary for the purpose of bearing the wires which transmit the electricity to the electric lamps for lighting the streets, is among the public uses to which a street may properly be devoted.

New York Chambers, August, 1883.

MOTION for a peremptory writ of *mandamus*, commanding the defendants to forthwith remove a certain pole, erected by the United States Illuminating Company upon the sidewalk in front of property of the relator, No. 1303 Third avenue, city of New York.

Ecclesine & Tomlinson, for relators.

Butler, Stillman & Hubbard, for respondent.

HAIGHT, J. — The United States Illuminating Company is a corporation organized under an act of the legislature passed February 16, 1848, entitled "An act to authorize the formation of gas-light companies," and the several acts amendatory thereof, and is engaged in the business of lighting by electricity the streets, avenues, public parks and places, and public and private buildings, in the city of New York. As such corporation it has a contract with the city to furnish light for certain streets and public places by means of electricity. Chapter 512 of the Laws of 1879 provides, "any such company shall have full power to carry on the business of lighting by electricity cities, towns and villages within this state, and

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the streets, avenues, public parks and places thereof, and public and private dwellings therein, and for the purposes of such business to generate and supply electricity, and to make, sell or lease all machines, instruments apparatus or other equipments necessary therefor; and shall also have power to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures, in, on, over and under the streets, avenues and public parks and places of such cities, towns or villages, and for conducting and distributing electricity, with the consent of the municipal authority thereof, and under such reasonable regulations as they may prescribe."

On the 3d day of May, 1881, the board of alderman of the city passed the following ordinance:

"*Resolved*, That the United States Illuminating Company of New York is hereby authorized and empowered to lay tubes, wires, conductors and insulators, and to erect lamp posts in the streets, avenues, parks and public places in this city, for the purpose of conveying, using and supplying electricity or electrical currents for purposes of illumination. All excavations in streets, removals and replacements of pavement or sidewalks to be done under and according to the directions of the commissioner of public works, and under such further conditions as to security against damage to sewers, water pipes, gas pipes or other pipes, as may be prescribed by his honor the mayor, the comptroller and the commissioner of public works, who are now by law authorized to make provisions for lighting the streets of the city; whenever, at any time, any permit shall be granted to open the streets, pavements or sidewalks, for the purpose of laying the tubes, wires, conductors and insulators of the company, a sum equal to one cent per lineal foot of streets occupied under such permit shall be paid to the city. Nothing herein contained shall be deemed to authorize the laying of the mains or pipes for conveying gas, nor the erection of any lamps or lamp posts to be used for illuminating by gas."

Pursuant to the foregoing ordinance the department of pub-

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lic works on the 29th of March, 1882, gave permission to the United States Illuminating Company to erect poles and place wires thereon in accordance with the foregoing ordinance in Third avenue, from Bowery to Harlem river; particularly specifying the size and kinds of poles to be used, the places at which they should be placed, and so forth.

On the 19th of December, 1882, the board of aldermen passed the following ordinance:

“Resolved, That the commissioner of the department of public works be and he hereby is directed to notify the United States Illuminating Company that the poles erected by it in the various streets and avenues of the city must in all cases be painted in accordance with established regulations, and also that all poles to be hereafter erected in this city by said company shall be painted before placed in position, in order that they may not present an unsightly appearance.”

At the time of the adoption of this last resolution the United States Illuminating Company had already erected and had in use upwards of 1,200 poles.

It is contended, in the first place, that the statute referred to is unconstitutional and void, in so far as it authorizes erection of poles in the public streets of the city without providing compensation to abutting owners. The case of *Story agt. New York Elevated Railroad Company* (90 N. Y., 145) is relied upon to sustain this claim. In this view I am unable to concur. When the streets were taken for public use, they were taken for all of the purposes to which they may properly be devoted, and compensation was then awarded to the owner. The chief use to which the streets are devoted is the right of the public to freely travel over and upon the same. But this is not the only use. The right of constructing sewers, of laying gas and water pipes, &c., have long been recognized as uses to which the streets may properly be devoted. In crowded cities, light is necessary in the streets in order to aid the public to pass safely along the public way. The erection of lamp posts, therefore, in the street is one of the uses to which it

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may properly be devoted. The lamp posts, however, would be useless unless they were supplied with light. For years gas has been chiefly used, and has been supplied by means of pipes laid under ground. Recently, lighting by electricity has come into use. Electricity has to be communicated to the lamps by means of wires. The usual mode in use of sustaining the wires is to affix them to poles, and it appears to me that the planting of necessary poles for the purpose of bearing the wires that transmit the electricity to the lamps is among the public uses to which the street may properly be devoted.

It is contended, in the second place, that the board of aldermen of the city has never given its consent to the erection of poles. The resolution of May three does not in express terms give such consent; it authorizes the laying of tubes, wires, conductors and insulators, and the erection of lamp posts in the streets, &c. I am of the opinion, however, that inasmuch as the usual mode of bearing wires is by means of poles, that the consent of the board of aldermen to the erection of necessary poles is fairly to be inferred from the language of the ordinance. This was the understanding and construction given to the ordinance by the department of public works, in the permission given by that board to erect poles and place wires thereon, &c. That construction appears also to have been given by the board of aldermen itself in the adoption of the ordinance of December 19, 1882.

Motion for *mandamus* denied, with ten dollars costs.

Louden agt. Louden.

N. Y. COMMON PLEAS.

ANNIE B. LOUDEN agt. DAVID B. LOUDEN.

Attorney's fees — An allowance may be made to counsel upon the discontinuance of a divorce case — Appeal — When discretionary order appealable.

Under section 1294 of the Code, an attorney, though not a party to the action, can appeal from an order refusing his fees.

An allowance may be made to counsel upon the discontinuance of a divorce case, under section 1769 of the Code (*See Chase agt. Chase, ante, 308*).

A discretionary order is appealable to the general term when it affects a substantial right.

General Term, August, 1883.

Before DALY, P. J., J. F. DALY and BEACH, JJ.

THIS suit was for a divorce *a mensa et thoro*; commenced by serving a summons and complaint, together with a petition and notice of motion for alimony and counsel fees. Before the return day of the motion the plaintiff and defendant amicably adjusted their differences. The plaintiff's attorney, on the return day of the motion, presented an affidavit of these facts, and obtained an order from hon. J. F. DALY, one of the judges of the court, requiring the defendant to pay him a counsel fee. The defendant moved, before hon. C. H. VAN BRUNT, to vacate this order on affidavits of both himself and the plaintiff that they had become reconciled, and that plaintiff's attorney commenced the action without authority. The attorney responded with three affidavits, showing that the fact of settlement was communicated to judge DALY when he signed the order; and that the plaintiff expressly authorized the suit, had the complaint and petition carefully read to her, read them herself, and finally after keeping them nearly twenty-four hours in her possession, went before a notary and verified them in the absence of her attorney or anyone representing him.

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Judge VAN BRUNT, however, vacated the order for an allowance, writing a memorandum that the plaintiff had condoned the cause of action by settlement and the suit should not be continued. From this order the plaintiff's attorney appealed.

Henderson Benedict, for appellant, contended: 1. That the plaintiff's attorney could appeal from an order discontinuing the action without allowing his fees, though not a party to the suit (*Code*, sec. 1294; *McKenzie* agt. *Rhodes*, 13 *Abb. Pr.*, 337; *Hobart* agt. *Hobart*, 86 *N. Y.*, 636). 2. The order allowing a counsel fee, under section 1769 of the Code, on a discontinuance of the action is proper (*Green* agt. *Green*, 3 *Daly*, 62). 3. Though discretionary, the order is appealable to the general term, as it affects a substantial right (58 *N. Y.*, 215; 56 *id.*, 72; 3 *Hun*, 375; 70 *N. Y.*, 10). 4. The affidavits presented overwhelming proof that plaintiff authorized the suit.

Linaday & Flammer, for respondent, contended the appeal should be dismissed or the order affirmed.

The court decided unanimously to reverse the order appealed from, and required the defendant to pay the plaintiff's attorney a counsel fee and the disbursements of the action, together with the costs and disbursements of the appeal, within ten days after service of the order, thus holding an appeal by an attorney proper under section 1294 of the Code; an allowance to counsel under section 1769 of the Code, upon the discontinuance of a divorce case; and a discretionary order appealable to the general term when it affects a substantial right.

Weeks *et al.* agt. Cornwell.

SUPREME COURT.

SAMUEL WEEKS, Jr., *et al.*, respondents, agt. JACOB WEEKS
CORNWELL and others, appellants.

Will—Construction of—When trust attempted to be created too indefinite, and the discretion vested in the trustees too wide to be upheld.

The testator, after making specific legacies, gave his wife, during her life, four houses in Fifth avenue, devising the remainder, after the life estate, by the twenty-fourth clause of his will, to his executors, "upon trust to use the same as in their judgment they deem to be for the best interest of my whole estate," with power to mortgage the land for any sum in their discretion, and after paying and keeping paid all taxes and assessments upon the property, and after expending such amounts as they may deem necessary to keep the said premises in good order and repair and properly insured against loss and damages by fire, to divide and pay the remainder at any time within ten years to each and every of his legatees (except two servants), &c. By the twenty-fifth clause, the testator gave the fee of this Fifth avenue property "to each and every one of my legatees herein named (except two servants) to be divided among such legatees in the proportion which his, her or their specified legacies hereinbefore named and bequeathed, bear to each other:"

Held, that the twenty-fifth clause is a plain and legal devise of the Fifth avenue property to take effect upon the termination of the trust estate created by the twenty-fourth clause, and is not void for uncertainty, either as to the objects of the testator's bounty or their relative proportions. The twenty-fourth clause, however, is invalid, the trust attempted to be created being too indefinite, and the discretion vested in the trustees too wide to be upheld, and the lands sought to be partitioned vested on the termination of the life estate in the persons designated as the testator's legatees, and by him declared to be his legal heirs (*See S. C.*, 64 *How.*, 276).

First Department, General Term, August, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from judgment of special term in an action for the partition of certain lands, and motion for new trial under the provisions of section 1001 of the Code of Civil Procedure.

Weeks et al. agt. Cornwell.

Flamen B. Candler, William Fullerton and J. M. Peters, Abner C. Thomas, Edward P. Wilder, guardian, &c., for appellants.

William A. Beach, A. H. Stoiber, W. B. Pulney, S. H. Thayer, E. Ellery Anderson, for respondents.

DAVIS, P. J. — This action involves and depends upon the construction of certain provisions of the last will and testament of Jacob Weeks, late of the city of New York. The testator, after several other provisions for his wife, devised to her the lots of ground and the buildings erected thereon in the city of New York, known by the present street numbers 750, 752, 754, 756 Fifth avenue, for and during her life. He made also some absolute devises of lots in the city and elsewhere, and a large number of devises to the trustees named and appointed by the will to receive and collect the rents of the property specified in them, respectively, and pay the same to the beneficiaries designated during their respective lives, and at their several deaths he devised the remainder to their heirs, &c. In this manner he disposed of all his real estate, except the remainder, after the life estate of his wife, of the Fifth avenue lots above mentioned by numbers. In respect of them the only disposition of the remainder is made by the twenty-fourth and twenty-fifth clauses of the will, and it is upon the construction of those clauses that the right to maintain this action, brought to partition those several lots among the heirs-at-law of the testator, depends. The twenty-fourth and twenty-fifth clauses of the will are as follows:

Twenty-fourth. All the rest, residue and remainder of my estate, real and personal, that I may own at the time of my death, and not hereinbefore bequeated in fee or upon trust, I give, devise and bequeath to my said executors, upon trust, to use the same as in their judgment they deem to be for the best interest of my whole estate; and, in order to raise money for that purpose, I empower them to mortgage the piece or parcel of land, being the residue and remainder of my estate

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and not hereinbefore disposed of in fee or upon trust, and after paying and keeping paid all taxes and assessments upon said property, and expending such amounts as they may deem necessary to keep the said premises in good order and repair, and properly insured against loss and damage by fire, to divide and pay the remainder, at any time within ten years, to each and every of my legatees hereinbefore named, except Ann Davey and Hugh Collins, in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other. The heirs of such legatees as may have died to take the share to which said legatee would, if living, have been entitled.

Twenty-fifth. Upon the termination of the real estate trusts herein contained, where I have not hereinbefore disposed of the fee of my real estate, I do hereby give, devise and bequeath the fee of said real estate trust property to each and every one of my legatees herein named, except Ann Davey and Hugh Collins, to be divided among such legatees in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other; the heirs of such legatees as may have died to take the share to which said legatee would, if living, have been entitled; meaning and intending by this to regard each of my legatees, except Ann Davey and Hugh Collins, a legal heir to my estate, limited to the said trust property in the proportion named.

The Fifth avenue property, being the only lands of the testator not finally devised by the will, is concededly the real estate intended to be affected by the twenty-fourth and twenty-fifth clauses. It had already been subjected to one life estate—that of the testator's wife. Upon her decease, the testator, by the twenty-fourth clause of his will, devises that property in trust to his executors. He declares the trust in these words: "To use the same as in their judgment they deem to be for the best interest of my whole estate." This trust he couples with a special power, and for a special purpose; that is, to mortgage the land for any sum in their dis-

Weeks et al. agt. Cornmell.

cretion, and after paying and keeping paid all taxes and assessments upon the property, and after expending such amounts as they may deem necessary to keep the said premises in good order and repair, and properly insured against loss and damages of fire, to divide and pay the remainder, at any time within ten years, to each and every of his legatees, &c.

The scheme of this clause, in the testator's mind, though ill expressed, seems to us quite apparent. The Fifth avenue estate was very valuable. The income from it would be large, ranging probably from fifteen to twenty-five thousand dollars per annum. He designed of this income to create a safety fund, so to speak, which, aided by the powers to raise an additional amount by mortgage, would be sufficient to protect his "legatees," as he calls them, in the enjoyments of his bounty, by using the same as the trustees might deem to be for the best interest of the whole estate. Out of the trust funds, whether accruing from income or mortgage, the trustees are to pay all taxes and assessments on the Fifth avenue property, all necessary repairs and insurance, and out of the unexpended moneys of the trust, within ten years, to divide and pay the remainder to all his legatees (with specified exceptions), or their heirs, if any shall have deceased, in the proportion prescribed by the clause. He limits the continuance of the trust to ten years, but clothes the trustees with discretion to close it at any time sooner by the division of the unexpended remainder.

The twenty-fifth clause relates solely to the final disposition of the Fifth avenue property, which is to be made at the termination of the trust created by the twenty-fourth clause. It has no reference to the trusts when the fee of the land to which they were respectively attached had been disposed of by the testator in the other provisions of his will, but is to become operative, as he declares, "upon the determination of the real estate trusts herein contained where I have not disposed of the fee of my real estate." The trust of the twenty-fourth clause is the only one which answers this description, and the twenty-fifth clause is therefore to be read as though it

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had said: "Upon the termination of the trust created by the twenty-fifth clause I give and bequeath the fee of said real estate trust property" (meaning plainly the Fifth avenue lots) "to each and every one of my" (his) "legatees." There is no room to doubt that by the word legatees he meant every one to whom he had given the income of the several life estates, or devised any real estate, except the two servants to whom he had devised the house in Twelfth street; and to make this still clearer he adds, "meaning and intending to regard each of my legatees, except Ann Davey and Hugh Collins, a "legal heir" to my estate, limited to said trust property in the proportion named. There is no legal difficulty, however troublesome in practice the making of the division may be. It would be made, if at all, upon rules and principles of valuation which will ascertain the ratio or proportion intended by the testator. If the gifts were of money the proportion would be easy of ascertainment, and as they are of property which can be valued in money, the proportionate value, though more difficult, is not impossible. The twenty-fifth clause of the will is therefore a plain and legal devise of the Fifth avenue property, to take effect upon the termination of the trust estate created by the twenty-fourth clause. It declares the objects of his bounty and their relative proportions with sufficient legal distinctness, and is not void for uncertainty in either particular.

The whole question then is, whether the limits of the twenty-fifth clause are void for any reason. We have already seen that one life estate had been imposed upon the fee of the Fifth avenue lots. That was valid and has expired. The testator could lawfully tie up the fee for one life more, but not a period beyond one more life in being. In the view we take of the clause, he has attempted to create conditions which suspend the power of alienation for a period limited only by ten years. This he could not lawfully accomplish except by the creation of a trust authorized by the statute. But our statute does not authorize the creation of a trust of a

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portion of an estate to be, by the trustees, used "as, in their judgment, they deem to be for the best interests of the whole estate." The objects of the trust are too indefinite, and the discretion vested in the trustees too wide to be upheld under any of the several provisions of the Revised Statutes, entitled "Of Trusts."

We are therefore of opinion that the twenty-fourth clause of the will must be regarded as invalid. But the twenty-fifth clause does not therefore fail. The words, upon the termination of the real estate trusts, &c., are fully satisfied by its failure for legal invalidity. The devise of the fee by that clause being valid, the several devisees take by operation of the devise instantly upon the termination of the prior life estate. The fee would descend to the heirs upon that event but for the fact that a valid devise carries it to another class, whom the testator names as legatees, and declares to be his legal heirs of the sufficiently defined real estate. The fact that we must refer to an invalid provision of a will to get a definite description or designation of the lands given by a subsequent valid devise, is an unimportant circumstance not prejudicial to such devise.

Our conclusion is, therefore, that the land sought to be partitioned vested by virtue of the twenty-fourth clause of the will in the persons designated as the testator's legatees and by him declared to be his legal heirs. And that the judgment of the court is, and so far as necessary should be, modified to conform to this conclusion, and as so modified affirmed, with costs of all parties out of the fund.

We think it would be safer to bring in the children of the living beneficiaries of the parties as suggested by the answer and points of the defendant Nathaniel T. Weeks, by staying proceedings temporarily, and by consent of the several parties without the necessity of a new trial, and without prejudice to the proceedings already had, and the several parties can be heard thereon if desired, on the settlement of the order.

DANIELS, J., concurs.

Rider agt. New York, West Shore and Buffalo Railway Co.

SUPREME COURT.

WILLIAM W. RIDER agt. THE NEW YORK, WEST SHORE AND
BUFFALO RAILWAY COMPANY.

Injunction — against railroad, when should not be granted.

An injunction should not be granted restraining a railroad from constructing an embankment on its own land, which is necessary to make its road-bed safe, because such embankment has already slipped and is liable to further slip on plaintiff's land and ruin a spring.

Ulster Special Term, August, 1883.

UPON a complaint which alleged that the defendant was constructing an embankment upon its own land, upon which was located its railway track, which had slipped upon the land of the plaintiff, and was liable to further slip and slide upon such land and ruin a spring claimed to be worth \$1,000, the plaintiff had obtained an injunction enjoining the doing of further work on such embankment by the defendant. Upon an affidavit showing that the work enjoined was necessary to protect the embankment, judge OSBORN granted an order staying the operation of the injunction, and ordering the plaintiff to show cause why such injunction should not be dissolved.

Carroll Whittaker, for defendant and motion.

John A. Griswold, for plaintiff and opposed.

WESTBROOK, J. — The theory of the complaint is that the defendant can be restrained from constructing an embankment on its own land, which is necessary to make its road-bed safe, because such embankment has already slipped, and is liable to further slip on plaintiff's land and ruin a spring. The objections to its continuance are: (1.) That the interests of the public require the road-bed to be made secure. (2.) The damages of the plaintiff are capable of estimation and can be

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recovered. (3.) There is no allegation that the defendant is unable, pecuniarily, to respond; and (4.) As the interest of the defendant requires it to construct the bank so that it will not slip, there is no need of an injunction, and a continuance of the injunction may, by preventing work, stop the defendant from making secure the embankment already constructed, thus causing it to slide and do the very injury which the injunction seeks to prevent.

The injunction will, therefore, be dissolved, with ten dollars costs, to abide the event of the action.

CITY COURT OF NEW YORK.

JOHN DICKIE agt. ROBERT F. AUSTIN and others.

Discovery of books to prepare for trial — When will be refused.

In an application for an order for the discovery of books, the petitioner stated that "he is unable to name specifically all the books which will be necessary," and the inspection is intended to cover any books which the defendants have relating to the transactions in which the plaintiff was interested.

Held, that such a discovery is unusually broad and sweeping, and not such as courts are in the habit of granting in aid of common-law actions for the recovery of a specific sum of money.

The petition must state what information is wanted, and that the books referred to contain such entries. It is not enough to show that they probably will furnish the desired information. The petition should point to the places where the information sought for exists and describe the entries.

If the discovery is plainly attainable by competent and available testimony, a production of books should not be allowed without special circumstances.

Special Term, August, 1883.

Morrison & Kennedy, for motion.

E. H. Benn, opposed.

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McADAM, J.— The plaintiff claims that he was to receive one-third of the gross profits on certain sales made by him for the defendants. These sales are said to aggregate \$264,343.58. It appears that settlements were had from time to time on statements furnished by the defendants. But the plaintiff now insists that in these accounts the defendants unlawfully deducted from his share of the profits “certain sums” which he claims he should have received, but did not. This action was brought to recover those sums, which the plaintiff supposes aggregate about \$2,000. The present application is for an inspection of the sales books used by the defendants between May 1, 1880, and May 1, 1883, as well as the ledgers used during that period, wherein the plaintiff’s account was kept, and in which the merchandise and sales account were entered. The object of the inspection is to enable the plaintiff to prepare for the trial of the action. The petitioner says that “he is unable to name specifically all the books which will be necessary,” and the inspection is intended to cover any books which the defendants have relating to the transactions in which the plaintiff was interested. I need not say that such a discovery is unusually broad and sweeping and not such as courts are in the habit of granting in aid of common law actions for the recovery of a specific sum of money. Such applications are, as a rule, referred to courts of equity (1 *Sand.*, 700). The character of the application and the general manner in which the alleged indebtedness is expressed as “certain sums” amounting to “about” \$2,000, indicate, in a mild way, that the plaintiff does not really know whether he has a cause of action or not, and that a discovery before the trial is therefore material to enable the plaintiff to determine how to prove his cause of action, if it can be proved at all. In this view the application is a prudent one for the plaintiff to make; but it does not follow, from this circumstance, that it ought, in the exercise of a wise discretion, to be granted. There are certain general rules which regulate applications like the present, one of which is that the petition must state

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what information is wanted, and that the books referred to contain such entries (19 *Abb. Pr.*, 111; 44 *Barb.*, 39). It is not enough to show that they probably will furnish the desired information (26 *How.*, 177), and an application for the discovery of documents was denied, where the petition did not point to the places where the information sought for existed, nor describe the entries except by stating their supposed effect (55 *How. Pr.*, 351). In *Cutter agt. Pool* (3 *Abb. N. C.*, 130), a case somewhat like the present, the court denied the application, leaving the plaintiff to procure whatever books he required upon the trial by the ordinary process of *subpœna duces tecum*. In 12 *Legal Observer* (p. 137) it was said: "If the discovery is plainly attainable by competent and available testimony, a production of books should not be allowed without special circumstances."

The only special circumstances which appear in this case, are those before mentioned, and these do not bring the case within any rule which justifies me in granting the relief applied for. It follows that the application must be denied, with ten dollars costs to abide the event.

SUPREME COURT.

CATHARINE LACHENMEYER, appellant, agt. AUGUST
LACHENMEYER, respondent.

Practice — Costs in divorce suits — Right of attorney to costs — When leave to issue execution therefor should be granted — Code of Civil Procedure, sections 763-779.

The defendant in this action, by his wife for a limited divorce, moved to vacate an order of arrest upon which he had been held. An order denying the motion was affirmed by the general term, and an appeal to the court of appeals was dismissed, with costs. The remittitur upon the decision of the court of appeals was received by the attorney on June 22, 1882, and on the following day the plaintiff died. Judgment

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was entered on the remittitur and the costs and disbursements adjusted at \$117.77:

Held, that the costs belonged to the attorney who made the disbursements and rendered the services, and that leave to issue execution for their collection should have been granted, his right to receive them being in no manner dependent upon the continuance of the life of his client (BRADY, J., *dissents*).

First Department, General Term, August, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL by Albert Day from an order denying a motion for leave to issue an execution for the collection of costs and disbursements allowed to be recovered under the decision of the court of appeals.

Albert Day, in person.

George F. Langbein, for respondent.

DANIELS, J. — The action was prosecuted by the plaintiff against the defendant, as her husband, for a separation. She died on the 23d day of June, 1882, and as that event preceded any trial of the action, it necessarily brought it to an end. But, while it was pending, the defendant moved to vacate an order upon which he had been arrested in the action. This motion was denied, and on appeal to the general term the order was affirmed, and a further appeal from the last order to the court of appeals was dismissed, with costs. The remittitur upon the decision of the court of appeals was received by the attorney on the twenty-second of June, the day before the plaintiff died, and it was afterwards filed and an order entered, as that could be done, rendering the judgment of the court of appeals the judgment of the supreme court as of the 22d of June, 1882 (*Code of Civil Pro.*, sec. 763).

The attorney afterwards, on motion, obtained the adjustment of the costs and disbursements in this particular proceeding at the sum of \$117.77, and demanded payment of

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that amount from the defendant's attorney, who refused to comply with the demand.

By the affidavit it appears that the services were wholly rendered and the disbursements all made by the attorney himself, who now claims to be allowed to collect these costs. Under these circumstances they belonged to him. They were a compensation for the services he alone rendered and the moneys he in fact had paid out, and under the rule sustained by *Marshall* agt. *Meech* (51 N. Y., 140) these costs and disbursements were, in fact as well as in law, his property, and his right to receive the amount was in no manner dependent upon the continuance of the life of his client.

It is not necessary that the action itself shall continue to be prosecuted to collect these costs, neither was the right of the attorney to require their payment extinguished by the abatement of the suit. It was so much money he had acquired the right to collect and receive for himself from the defendant. The costs were given unqualifiedly; and at the time they were so given the attorney was vested with the right to have them adjusted and collected for his own benefit from the defendant, and that right is capable of being enforced under section 779 of the Code of Civil Procedure as it has now been amended. By force of that section an execution stating the facts may be issued against the personal property of the defendant, and these costs may be legally collected under it. It appeared that a motion had been made on the part of the plaintiff, which was denied on the 22d of June, 1882, with ten dollars costs, and that those costs had not been paid. This order was not shown to have been served either upon the plaintiff or her attorney, and for that reason no such default in the payment of the costs has been shown as would render the order a stay under the language of section 779 of the Code of Civil Procedure. These motion costs, by the order, were also required to be paid by the plaintiff herself to the defendant; and if service of the order had been shown the effect of the omission to pay would have been a stay of the proceed-

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ings only on the part of the party required to make such payment. The attorney who is now endeavoring to collect the costs in legal effect allowed to him by the decisions of the courts was not this party. The proceedings, therefore, could not be stayed by the omission of the plaintiff to comply with that part of the order which required her to pay these motion costs to the defendant. The order in this case should be reversed and an order entered directing the issuing of an execution in favor of the attorney against the personal property of the defendant for the collection of the costs finally recovered under the decision of the court of appeals; and the usual costs and disbursements upon the appeal should also be allowed.

DAVIS, P. J., concurs.

BRADY, J. — It appears that a former action by the plaintiff for the same cause was dismissed upon the merits, on the ground that the plaintiff's marriage under the laws of Louisiana, in which state the alleged marriage took place, was not lawful; and a judgment was entered thereupon which gave to the defendant costs in the sum of \$114.58. This judgment existed and the costs were unpaid at the time of the commencement of this action, in which the defendant was arrested and held to bail. A motion was made to vacate the order of arrest; which was denied, and such proceedings were subsequently had in reference to it that the court of appeals dismissed the defendant's appeal, with costs against him in favor of the plaintiff, and which costs, it appears, amounted to \$117.71. It appears also that during the proceedings and pending the appeal mentioned the plaintiff's attorney was allowed \$250 counsel fee, of which the defendant was compelled to pay him \$100, and ten dollars costs as the condition of a stay of proceedings pending the appeal. These sums were paid. Subsequently, it appears, the court reduced the amount of the original counsel fee one-half, namely, to \$125, and on the 8th of May, 1882, the plaintiff's attorney was paid

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that sum, together with ten dollars costs, amounting in all to \$135, thus making in the aggregate the sum of \$245 which was paid to the plaintiff's attorney for himself up to the date specified.

It appears also that subsequently the plaintiff's attorney moved for a further allowance, which motion seems to have been denied upon the 22d of June, 1882. On the 23d of June, 1882, the plaintiff died intestate. On the day previous the remittitur from the court of appeals dismissing the appeals, as already mentioned, from the order denying motion to vacate the order of arrest, was filed in this court. On the 6th of July, 1882, the plaintiff's attorney taxed the costs of the appeals at \$117.77.

It appears further that some negotiations took place in reference to the payment of the plaintiff's costs, which resulted in a disagreement, and subsequently the plaintiff's attorney obtained an order to show cause why his bill of costs should not be paid to him as counsel fee or allowance therein for services as attorney and counsel for the plaintiff in this action, and why the defendant should not pay to him such further counsel fee or allowance for his services rendered to the plaintiff as her attorney and counsel and the disbursements in this action, as to the court might seem just and in accordance with equity and good conscience, and why the plaintiff's attorney should not have execution or precept therefor in this action in the name of the plaintiff, to enforce the collection of the same, and why he should not have such other and further relief, as to the court seemed just.

It appeared upon the motion, that no judgment had been entered herein for costs awarded by the failure of the defendant's appeal from the order denying the motion to vacate the order of arrest. The motion was decided adversely upon the propositions: First. That it was entirely unprecedented; and Secondly. Assuming that judgment for costs had been entered, the right of execution went to the plaintiff's personal representatives, and not to the attorney of the deceased, whose

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power was spent by the plaintiff's death, and who could take no action to recover the costs until employed by them so to do. The court expressed a belief in the equitable claim of the plaintiff's attorney to these costs, but his mode of procedure to obtain them was regarded as without warrant or authority.

Such is the conclusion of this court upon the facts. If the motion were in a condition to be heard without reference to the preliminary objections, which are fatal, the propriety of setting off this judgment would necessarily be involved. The defendant having recovered in one action, and having a judgment for costs, and having, as we have seen, paid the various sums allowed to the plaintiff's attorney for his services in the action, and no evidence having been produced showing that the services rendered by him were worth more than the sum received, it might be very questionable whether the court would consider the application meritorious, even if it were presented in such a condition as to be entirely free from errors of substance or of form. But, as suggested by the learned justice in the court below, it presents now such legal infirmities that no principle of law can be called into requisition to aid it, and the duty devolves upon this court, therefore, to affirm the order, with ten dollars costs and disbursements of this appeal.

SUPREME COURT.

MARTIN T. McMAHON, receiver of taxes in the city of New York, agt. HENRY H. BEEKMAN *et al.*, executors, &c.

New York (city of) — Tax commissioners — Responsibility of assessment, or fixing the valuation of property for taxation, upon whom put — When the assessment deemed to be made.

It is the manifest purpose of all the legislation upon the subject to put the responsibility of assessment, namely, the fixing of the value of property for taxation, in the city of New York, upon the tax commissioners alone.

The day when the assessment must be deemed to be made, and be final

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(except in cases of amendments and correction of mistakes specially provided by statute), is the second Monday of January in each and every year.

Although the machinery necessary to secure revenue from personal property has necessarily to act upon the individual, it is the property itself, and not the person that bears the tax, and the change of ownership, or condition of the individual relatively to the property, after the value is fixed, cannot operate to relieve the property from the tax.

Where a party died, June twenty-second, after the time when the annual record was placed in the hands of the tax commissioners (*i. e.*, second Monday of January) and after it was closed against correction (*i. e.*, first day of May), but before the delivery of the rolls by them to the board of Aldermen (*i. e.*, July first):

Held, that the assessment of his personal estate was completed before his death, and consequently a recovery for such tax could be had against his executors.

Special Term, May, 1883.

DEMURRER to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

Messrs. Nash & Kingsford, for defendants.

George P. Andrews, counsel to the corporation.

E. H. Lacombe, of counsel, for plaintiff, made and argued the following points: The defendants' testator died June 22, 1881, and the only question presented to the court is whether the tax laid upon his personal property for that year is a subsisting charge against his estate. It is claimed by the plaintiff that although the machinery necessary to secure revenue from personal property has necessarily to act upon the individual, it is the property itself and not the person that bears the tax, "all lands and all personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified" (*R. S.*, part 1, chap. 13, tit. 1, sec. 1), and it is therefore claimed that the change of ownership or condition of the individual relatively to the property after the value is fixed cannot operate to relieve the prop-

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erty from the tax. It is further contended that in this city the condition of the property as to ownership, &c., is to be taken, as it was, on the second Monday of January, 1881. In support of this proposition the plaintiff begs leave respectfully to submit an opinion given by the corporation counsel to the department of taxes on April 5, 1882, not as any authority for the position here contended for, but as a full statement of exactly what that position is, it being assumed that being in print the authorities cited thereon may more readily be consulted by the court than if they were rewritten in the manuscript of this brief. It will be noted that the first case cited, namely, *Mygatt agt. Washburn* (15 N. Y., 316) is in effect the same case as that of *The People agt. The Supervisors of Chenango* (11 *id.*, —), referred to on the argument by the counsel for the defendants. In addition to the propositions advanced in that opinion, attention may be briefly called to a few provisions of the *Consolidation Act* (vol. 2, *Session Laws of 1882*). The provisions as to laying taxes will be found in sections 812 to 864. It will be noted that by section 829 the board of aldermen are required to deduct from the total amount of the various sums which they are by law required to raise by taxation the amount of probable receipts which the comptroller may report to them is to be anticipated during the coming year. It will also be noted that the aggregate amount necessary to be raised to pay the expense of conducting the public business of the city and county of New York, for each financial year, becomes fixed by the action of the board of estimate and apportionment and the aldermen, in December prior to the year in which the tax is laid (*Secs. 189, 203*).

MACOMBER, J.—The receiver of taxes in the city of New York seeks by this action to recover of the executors of Henry Lawrence the sum of \$1,572 for a tax imposed upon the latter's personal estate in the year 1881.

Under the statute, chapter 410 of the Laws of 1882 (being the New York City Consolidation Act of 1882), the prelimi-

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nary inquiries are begun by the deputy tax commissioners on the first Monday of September of each year, and the tax lists are required to be placed in the hands of the commissioners of taxes by the second Monday of January thereafter, where they constitute what is termed the "annual record of the assessed valuation of real and personal estate," and there remain open for examination and correction from the second Monday of January until the first Monday of May in each year, when they are closed to enable the commissioners to prepare assessment-rolls for delivery to the board of aldermen (*Id.*, secs. 314 to 317).

By the 819th section of the act the commissioners are empowered to increase the assessment valuation of any real or personal estate at any time before the second day of April, and may diminish the same at any time before the closing of the books on the first day of May in each year, as in their judgment may be necessary for the equalization of taxation, but no increase thereof can be made by them after the books are open for inspection and review, except on a notice of twenty days before the closing of the books to the party affected by such increase. By section 828 the commissioners are required, on the first day of May in each year, to prepare from the books of annual record of assessed valuations, assessment-rolls for the several wards of the city, to each of which shall be annexed their certificate that the same is correct in accordance with the entries in the books of the record. The rolls, by the same section, must be delivered on the first Monday of July of each year to the board of aldermen, who, by virtue of subsequent sections of the act, are required to impose the requisite tax and cause the same to be properly set down or extended in the several assessment-rolls. Section 832 authorizes the board of aldermen to correct the description of real estate of non-residents so as to conform to the provisions of law, and if such alterations cannot be made, they must expunge the same from the rolls.

Henry Lawrence having died on the 22d day of June, 1881,

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after the time when the annual record was placed in the hands of the tax commissioners, and after it was closed against correction, but before the delivery of the rolls by them to the board of aldermen, it is contended by the learned counsel for the defendants that the assessment of the personal estate of the defendants' testator was not completed before his death, and that consequently no recovery can be had therefor by the plaintiff. They cite in support of their position the cases of *People agt. Supervisors* (1 *Kern.*, 563); *Mygatt agt. Washburn* (15 *N. Y.*, 316) and *Townsend agt. The Mayor, &c.* (16 *Hun*, 362; *S. C. affirmed*, 77 *N. Y.*, 542).

The first two cases undoubtedly bear directly upon the question now involved, though of course they should be regarded as one, rather than separate, inasmuch as they grew out of the same transaction. It was there held, where one of the assessors, while engaged in ascertaining the names of the taxable inhabitants and the taxable property, in May, called upon a person then a resident of the town, and made an entry of his name and the value of his taxable personal estate at a given amount, and so informed him, and such person soon thereafter removed to another county, and afterwards, and in July, the assessors prepared and completed the assessment-roll, in which he was assessed for the above-named sum, that the assessment was not made till July, and the assessors had no jurisdiction to make it. The court there say (*as reported in 1 Kern.*, 571): "One assessor cannot make an assessment; it is the joint act of all, or at least of a majority of the assessors," citing the statute and the precedent authorities. In the case as it stood as *Mygatt agt. Washburn* (15 *N. Y.*, 320), the court, per DENIO, Ch. J., say: "Evidently there must be some day, in the course of the proceeding, on which the assessment may be said to be made. The fixing of this day cannot depend upon the degree of diligence with which the assessors perform their duty; for in that case it would be different in different towns, and there would be a liability to a double assessment. In my opinion the assessment should be consid-

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ered as made at the expiration of the time limited for making the inquiry, namely, on the first day of July. If there is any change of residence or in the ownership of the property after that day, it does not affect the assessment-roll; the inquiries are then completed. Any changes which the assessors are authorized to make after that time, are such as may be required to correct mistakes. No earlier day can be assumed, because what is done by one or all of the assessors prior to the first of July is inchoate and preparatory, and liable to be altered according to their final judgment upon the matter. When the statute speaks of the time 'when the assessment is made,' it refers to the binding and conclusive act which designates the taxpayers and the amount of the taxable property." See, also, *Clark agt. Norton* (49 N. Y., 243); *Westfall agt. Preston* (*Id.*, 349), which are in substance to the same effect.

All these decisions relate to the powers and duties of town assessors. While the times for discharging like duties by the tax commissioners of the city of New York, and the machinery by which the assessment of taxable property is accomplished, are different from those pertaining to other counties, yet these authorities render it not difficult to ascertain in the case before me — what they all aim at determining — the day when the assessment must be deemed complete. As it seems to me, aside from such difference in the times in which the assessment is to be made, and the difference in the names of the instruments by which it is to be accomplished, the analogies between the cases cited and this one are quite perfect. It is argued by counsel for the defendants, that all the proceedings of the tax commissioners are only preliminary inquiries; and, the rolls being open for inspection for fifteen days after they have been deposited with the board of aldermen, that it is the board of aldermen, and not the tax commissioners, who make the assessment, because, as they say, it is the board of aldermen who "impose" the tax. But making the assessment and the imposition of the tax are different things, and are not done by the same persons or bodies in any

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part of the State, so far as I am aware. Imposing the tax is nothing more than ascertaining the whole amount of taxes to be raised and the share of the burden which each item of the property already assessed shall bear. Assessment, as used in the statutes, is determining the value of a man's property for the purpose of levying a tax. The whole sum to be raised through taxation is ascertained by them from the reports of the city comptroller and from other sources named in the statutes. The aggregate is then distributed over the assessed property, and, as the statute expresses it, is properly set down or extended in the several assessment-rolls which have theretofore been placed in their hands by the tax commissioners. In this respect the board of aldermen perform precisely the same corresponding duties as the country boards of supervisors, to whom the rolls are furnished by the town assessors, as illustrated in the cases before alluded to. It would be extremely difficult, if not impossible, to devise and carry out successfully a scheme by which a board of supervisors or a board of aldermen should determine the valuation of property for taxation in individual instances. An examination of the provisions of the several statutes consolidated in the second volume of the Laws of 1882, convinces me that it was the manifest and uniform purpose of all the legislation upon the subject to put the responsibility of assessment, namely, the fixing of the value of property for taxation, upon the tax commissioners alone.

There is a day, therefore, when the assessment must be deemed to be made, and be final (except, of course, in cases of amendments, and the correction of mistake, specially provided for by statute), while yet the annual record of the assessed valuation of property is still in the hands of the tax commissioners. That time is, in my judgment, the second Monday of January. From the first Monday of September to the second Monday of January these books of record are prepared by the deputy tax commissioners under the direction of the tax commissioners themselves. They are delivered

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into the hands of the tax commissioners by the deputy tax commissioners, where they remain open for examination and correction until the first day of May, when they are closed. After that the tax commissioners have no power over the subject-matter contained in them. As the annual assessment record, containing the names of the taxable persons and the valuation and description of their property, it exists and is completed on the second Monday of January (*See opinion of RUGER, Ch. J., in People agt. Commissioners of Taxes, delivered March 13, 1883, not yet reported*). It is thereafter open only for corrections and amendments. On the first of May it is closed. After it is thus closed, the only duty or power of the commissioners which remains is to furnish assessment-rolls to the board of aldermen, with their certificate that they are correct, and to deliver them on the first day of July, thus conforming, *mutatis mutandis*, to the practice of assessors of taxes in towns. Hence, following the adjudged cases leads to the same conclusion as does a sound inductive reasoning from the policy and the terms themselves of the statutes.

While publication of the fact of such deposit, and that the rolls are open for inspection, is prescribed by law, no power is given to the board of aldermen or to any other person to correct them, save in respect to the amendments of the description of non-residents' lands, already mentioned.

If these views are correct, it follows that the complaint states a good cause of action, and that the defendants' demurrer should be overruled with costs. It is so ordered, with leave to the defendants to answer the complaint on payment of the costs of the demurrer.

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SUPREME COURT.

JANE CROWLEY, admx., &c., agt. GEORGE PALEN and another.

Negligence—What is—Master and servant—Negligence of servant is negligence of master—What is constructive notice—Negligence a question for the jury.

In an action brought by plaintiff for the wrongful killing of her son while crossing a public street in the city of New York by a horse driven by a person in the employment of the defendants, the horse taking fright from the passage of a train on the elevated railway, it appeared that the horse was taken to the same locality by the same driver on the preceding day and he then became frightened by the passage of a train on the elevated railway, the complaint was dismissed upon the sole ground that defendants had not been guilty of negligence :

Held, that when the horse became frightened by the passage of the train on the day preceding the accident, that was a circumstance from which it might well be inferred that he would be affected in the same manner whenever he should be taken to the same place again, and with that probability being known to the person who had charge of the horse, the point is by no means clear that he could be exonerated from the imputation of negligence when he exposed the horse to the same cause a second time.

What the law required from him was, that he should observe that degree of care and attention that experienced, careful and prudent persons would be expected to observe under similar circumstances when the entire risk of injury would rest upon themselves.

Whether this degree of care and attention was consistent with a second exposure of the horse to the object which had previously frightened him, was a question for the determination of the jury. It was a matter of inference to be deduced from the attendant circumstances, and what inference should be drawn it was the province of the jury to decide.

The fact that the horse was frightened on the preceding day while he was being driven by the defendants' servant was constructive notice to them of the occurrence itself. If he was negligent the law imputes the same degree of negligence to them whose servant he was.

Where the circumstances shown by the evidence are such that the jury may logically infer the existence of misconduct involving a want of reasonable care or negligence, the case should not be withdrawn from their consideration.

First Department, General Term, October, 1882.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

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MOTION by plaintiff for a new trial on exceptions, ordered to be first heard at the general term.

Charles W. West and Elliot Sandford, for plaintiff.

George W. Van Slyke, for defendants.

DANIELS, J. — The plaintiff brought this action to recover damages for the wrongful killing of her son, for whose estate she was appointed administratrix.

He was killed in September, 1879, while crossing a public street in the city of New York. At that time he was thirteen years and eight months old. From the corner of Pearl and Ferry street he, together with three others started to cross to the north-east corner of Pearl street and Peck slip, diagonally opposite.

While they were so crossing the street a horse driven by a person in the employment of the defendants collided with the deceased and so injured him as to produce his death. This horse took fright from the passage of a train on the elevated railway, and he became unmanageable and from that circumstance ran against and over the deceased.

At the particular time when this occurrence took place, and immediately preceding it, there may have been no want of care on the part of the person managing or driving the horse, if this had been the first time when he was exposed to the effects upon him of trains passing upon the elevated railway, it might be that the dismissal of the complaint at the trial would be proper. But it was not, for the horse was taken to the same locality by the same driver on the preceding day and he then became frightened by the passage of a train on the elevated railway.

His account of what then took place is as follows: "Q. What took place in the conduct of the horse that day? A. The cars frightened him. Q. What were his actions being frightened? A. Plunged right ahead. Q. How far did he run on that occasion? A. About the length of himself below

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the cross-walk in Peck slip, and about twice the length of himself after crossing the street in Ferry street. Q. Did he run fast or slow? A. Not very fast. Q. Did he jump? A. Yes. Q. Gallop? A. Yes.

The fact that the horse became frightened in this manner the day before the accident was a circumstance rendering it probable that he could not be taken into the same vicinity again without expecting a repetition of the same difficulty; and if that could not be done the inference is a plain one that he could not be used there without endangering the safety of persons equally entitled with the driver of this vehicle to make use of the street as the deceased was using it at the time of the accident. What might be apprehended did actually occur when this horse was next taken into the street. He became frightened and unmanageable, and from that cause the death of the deceased was produced. Whether persons lawfully using a public street should, in the exercise of reasonable care, be exposed to the risks of such accidents, would therefore appear under the circumstances to be rather a question for the jury than for the court to decide. If the driver could expose the horse to the same risk of fright on a second occasion without being chargeable with negligence in so doing, he might on any indefinite number of succeeding occasions, and in that way render him a continued source of danger to persons lawfully making use of the street. They would practically be deprived then of that protection which the law designs to secure by requiring the observance of due and proper care by persons in the use of public streets. And that would be as effectually done by taking the horse the second time into the same vicinity where the passage of the train would be expected to alarm him as though the already observed effect had on several other occasions been encountered. When the horse became frightened by the passage of the train on the day preceding the accident, that was a circumstance from which it might well be inferred that he would be affected in the same manner whenever he should be taken to

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the same place again. And with that probability being known to the person who had charge of the horse, the point is by no means clear that he could be exonerated from the imputation of negligence when he exposed the horse to the same cause a second time. What the law required from him was that he should observe that degree of care and attention that experienced, careful and prudent persons would be expected to observe under similar circumstances, when the entire risk of injury would rest upon themselves. Whether this degree of care and attention was consistent with a second exposure of the horse to the object which had previously frightened him, was a question for the determination of the jury.

It was a matter of inference to be deduced from the attendant circumstances, and what inference should be drawn it was the province of the jury to decide. In the case of *Philadelphia Railroad Company, &c., agt. Stinger* (78 Penn., 219), a point very similar to this in its character was considered by the court, and it was then in effect determined that a horse easily frightened by a locomotive could not again be taken and exposed in the same manner without rendering the person controlling him chargeable with negligence. These persons were equally entitled to the safe and free use of the streets. The fact that one was driving a horse gave him no advantage or superior right whatever over him who passed on foot (*Barber agt. Savage*, 45 N. Y., 191). Each was required to observe care for the purpose of avoiding risks or accidents, and when this horse was taken into the street with the probable apprehension by the driver that he would become frightened and unmanageable from the passage of the cars, a jury might very well conclude that he had omitted that care and attention which reasonable and prudent men would have exercised, and had consequently violated his obligation to the deceased. The fact that the horse was frightened on the preceding day while he was being driven by the defendant's servant was constructive notice to them of the occurrence itself (*Story on Agency* [4th ed.], sec. 140 ;

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Wharton on Agency, sec. 177; Bennett agt. Barber, 76 N. Y., 386).

If he was negligent, the law imputes the same degree of negligence to those whose servant he was. The safety and security of persons using the public streets of a city on foot requires that the law shall be carefully guarded and enforced against those using vehicles and needlessly exposing them to danger. The protection of life can be secured in no other manner, and where the circumstances, shown by the evidence, are such that the jury may logically infer the existence of misconduct, involving a want of reasonable care or negligence, the case should not be withdrawn from their consideration.

The evidence made out a case of this description and it should not have been, as it was, withdrawn from the jury because there was no want of care on the part of defendant's servant.

It is not necessary to consider the other propositions presented, whether the deceased was involved in fault, for the absence of fault upon his part, was assumed in the discussion and disposition of the case at the trial.

The verdict should be set aside and a new trial ordered, with costs to abide the event.

BRADY, J., concurs.

DAVIS, P. J. (dissenting).— This action is brought by the plaintiff, as administratrix, to recover damages for the death of the intestate, her son, a lad of about fourteen years of age.

On the trial it appeared that the intestate was killed by a horse and cart of the defendants, driven by their servant, who was engaged in carting leather for the defendants from their place of business to a place of shipment.

The horse and cart, it appeared, were crossing Pearl street, from Peck slip, under the New York Elevated Railroad. When about the length of the cart and horse from the railroad, a train was heard a short distance from the crossing which passed over the horse while he was under the track.

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The horse was on a walk at the time, but was frightened by the cars and suddenly jumped into a gallop, running a short distance into Ferry street, and in doing so ran over and killed the intestate, who, with several other lads, was at that moment crossing diagonally from Ferry street to Peck slip. The driver did all in his power to hold the horse and shouted to the boys, but owing to the noise of the train, was not heard before the accident. He succeeded in stopping the horse a few lengths beyond where the boy was hit. A witness of the plaintiff, who was standing by and saw the horse start and the accident, and immediately after picked up the deceased, testified that the driver of the cart was in nowise to blame, but did all in his power to hold the horse.

There was no evidence that the horse was a vicious one or had been accustomed to run away, except that his driver testified that on the day before in driving under the railroad at the same place, as the train passed over him, the horse had suddenly jumped, but was stopped in going three times his own length. The ordinance of the city forbidding fast driving was put in evidence. At the close of the evidence the court was of opinion that the plaintiff did not give sufficient evidence of negligence to justify a verdict in his favor, and granted the defendant's motion to dismiss the complaint, to which exception was duly taken. Whereupon, on plaintiff's motion, exceptions were ordered to be heard in the first instance at the general term. We are of opinion that the disposition made of the case by the learned judge at circuit was correct. The evidence did not show a wrongful driving within the meaning of the ordinance, forbidding the driving of horses beyond a certain rate of speed in the city. They relate to intentional fast driving and not to runaways, which the driver seeks to, but is unable to prevent. There was no negligence shown in the management of the horse on the occasion of the accident, nor any proof of want of skill in the servant as a driver. The whole case rests upon the single fact that the horse had been frightened and jumped on the day before, and turns

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upon the question whether what transpired at that time was sufficient to make it negligence on the part of the defendants to allow the use of the horse for their business purposes at or near the elevated railroad. It did not appear that either of the defendants knew of the incident of the day before, or that with notice of that incident, they had allowed the use of the horse to be continued.

But it may be assumed that the knowledge of their agent, under the circumstances, was their knowledge, and therefore it was necessary to determine whether what occurred on the day before was sufficient to require them to refrain from using that horse in the manner and place in which he was being used at the time of the accident.

The horse appears to have been seven or eight years old, and had been used as a cart-horse in the ordinary business of carting the plaintiff's commodities, and no proof was given of any previous indication that his use, if continued, would be dangerous, except the single incident mentioned. That proof only tended to show that the horse had jumped from sudden nervous excitement, occasioned by the train, but was immediately, and within three of his own lengths, brought down to a walk. And the fact tended more strongly to show that he was easily controllable and not dangerous, than to establish the contrary.

The most quiet horses accustomed to such trains are likely sometimes to be startled by the noise of the train to an extent equal or greater than that shown by the defendant's horse. But if they immediately yield to the restraint and control of the driver, and become steady and quiet, it is rather evidence of the absence of viciousness or propensity to run away than otherwise.

To hold that upon such a fact alone the use of the business horses of the city must be abandoned or their owners subjected to damages for accidents that may be occasioned by a sudden fright without any fault or negligence on the part of the driver, would be carrying the rule beyond any of the cases.

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If a horse be known to be in the habit of running away or to be vicious in any respect and liable for those reasons to do damage in the street, then the owner must use him at his peril and will be subject to liability for such injuries as his use causes.

That rule we think is not applicable to this case, and we are therefore of opinion that the exceptions should be overruled and judgment ordered on the verdict for defendants.

NOTE.—On the new trial judgment was rendered for plaintiff, from which no appeal has been taken. [REP.]

SUPREME COURT.

THE PEOPLE on the relation of EDWARD NEWCOMB, &c., agt.
JOHN A. McCALL, superintendent of insurance.

Receivers of life insurance companies — Fees of, how regulated.

Chapter 398 of the Laws of 1883, does not affect the fees of a receiver appointed previous to its passage, under chapter 902 of the Laws of 1869. When the services of an officer has been completed, and the work done on the faith of fees prescribed by a statute in force at the time of his appointment, a law which changes the amount to be paid for similar services should not be held applicable to it, unless expressly and plainly so declared.

Albany Special Term, June, 1883.

APPLICATION for a *mandamus* against the superintendent of insurance to compel him to fix the fees of the relator as the receiver of the Atlantic Mutual Life Insurance Company.

Charles J. Buchanan, for receiver and motion.

C. A. Dennison, deputy attorney-general, opposed.

WESTBROOK, J. — On the 21st day of July, 1877, the relator, Edward Newcomb, was duly appointed receiver of "The

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Atlantic Mutual Life Insurance Company," a corporation then located in the city of Albany. The appointment was made under and in pursuance of chapter 902 of the Laws of 1869, entitled "An act to amend an act entitled 'An act to authorize life insurance companies to make special deposits of securities in the insurance department, and to authorize the superintendent of said department to require special reports of such companies,' passed April twenty-fourth, eighteen hundred and sixty-seven, and also to provide for the appointment of receivers of such depositing companies in certain cases."

By the thirteenth section of such act it is provided: "The compensation of the receiver under this act shall be fixed by the superintendent and shall not exceed the sum of five per cent of the amount of the assets of such company as shall come into his possession."

On the 11th day of April, 1883, the legislature passed an act entitled "An act in relation to receivers of corporations" (*Chap. 398 of Laws of 1883*). The first section of that act provides: "Every application *hereafter* made for the appointment of a receiver of a corporation shall be made at a special term of the court, to be held in and for the judicial district in which the principal business of the corporation was located at the commencement of the action, wherein *such* receiver is appointed, or in and for a county adjoining such district; and any order appointing a receiver otherwise made shall be void."

The second section is as follows: "Every receiver shall be allowed to receive as compensation for his services as such receiver five per cent for the first one hundred thousand dollars actually received and paid out, and two and one-half per cent on all moneys received and paid out in excess of the said one hundred thousand dollars."

The third section enacts: "All orders appointing receivers of corporations shall designate therein one or more places of deposit wherein all funds of the corporation not needed for immediate disbursement shall be deposited; and no deposits or investments of such trust funds shall be made elsewhere,

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except upon the order of the court upon due notice given to the attorney-general."

The present application is for a peremptory *mandamus* in behalf of the relator, Edward Newcomb, against the superintendent of insurance, requiring the superintendent to fix the fees of the relator, as receiver, as hereinbefore mentioned, under the act of 1869, and presents two questions: 1st. Has the second section of the act of 1883 repealed, or in anywise affected, the thirteenth of that of 1869, as against Newcomb; and, 2d. If it has in any respect affected the older statute, is the *maximum* of compensation allowed by such older statute repealed. The application is founded upon the following further and other facts:

The trust of the relator was substantially closed when the act of 1883 became a law. On the 19th day of May, 1883, on notice to all parties, the superintendent of insurance was asked to fix the fees of the receiver under chapter 902 of the Laws of 1869, under which act the appointment had been made, and the duties of the receivership discharged. The superintendent decided that the act of 1883 fixed the fees of the receiver, and refused action under that of 1869. The receiver claims that the law of 1883 does not apply to him and asks that the court award a peremptory *mandamus* compelling the superintendent of insurance to adjust and fix the compensation under that of 1869. No other question has been discussed or presented, except these hereinbefore stated, and therefore attention will be at once directed to those and those only.

First. Has the act of 1883 any application, so far as it regulates the fees of receivers, to the relator? The point of the inquiry is not whether some of its provisions do not reach receivers previously appointed, but whether the particular section relating to fees does. The question is to be determined, bearing in mind a general principle of law thus stated in *Broom's Legal Maxims* (page 35): "Laws should be construed as prospective, not as retrospective, unless they are

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especially made applicable to past transactions, and to such as are still pending." This maxim has been repeatedly applied and never questioned. In *People agt. Supervisors of Columbia County* (43 N. Y., 130; see page 134), judge ALLEN, after quoting the same principle from *Bacon's Abridgment*, and referring to Broom's work, says: "The rule has been expressed in different terms by different judges and authors, but it has lost none of its force since it was first enunciated." Applying it to the case before us there is no difficulty, for the provision of the act of 1883 in relation to the fees of a receiver is not "*expressly* made applicable to past transactions, and to such as are still pending," and therefore the result stated in the maxim, that it must "be construed as prospective and not retrospective," follows. Not only is the section referred to (*sec. 2*) not made applicable to receivers already appointed, but it immediately follows one which relates only to receivers thereafter appointed; and it is immediately followed by another which also concerns subsequent receivership and no other. Placed then, as section 2 relating to fees of receivers is, between two other sections (*secs. 1 and 3*) which relate solely to receiverships thereafter appointed, another maxim of the law, "*noscitur a sociis*" (*Broom's Legal Maxims*, 588), applies.

It is said, however, that the words used, "every receiver," with which the section begins, cover and include the relator. This result would follow were it not for the two rules of law, to which reference has been made. The past appointments are not covered by such an expression unless it is by express words made applicable to them, and the surroundings of the words, applying the maxim of "*noscitur a sociis*," show that the "every receiver" there spoken of is to be one of a number thereafter to be appointed. This is no strained interpretation as two of many cases which might be cited show.

In *Johnson agt. Burrell* (2 Hill, 238) the question was whether the words "every judgment" used in a statute (2 R.

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S. [2d. ed.], 177, sec. 129), giving the remedy by *scire facias* for the revival of judgments, applied to one recovered before the passage of such statute. The court held it did not and said (*per* CowEN, J.): "It is a general rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. To give it that effect the statute should in terms declare an intention so to act."

The *Matter of the Bank of Niagara* (6 Paige, 213; see pages 217, 218) decides the very point under consideration. The question was as to the fees of the receivers of an insolvent corporation who had been appointed previous to the provisions of the Revised Statutes (2 R. S., 492, sec. 76), which limited the fees of receivers upon the voluntary dissolution of corporations to "the sum allowed by law to executors or administrators," and which provision as to fees (2 R. S., 464) was also made applicable to receivers of insolvent corporations. The chancellor held that the "statutory provisions are not retrospective in their operation," and that "as the usual allowances to receivers at the time of the appointment of the receivers of this institution was five per cent on the whole amount of their receipts and disbursements, that is, two and a-half per cent for receiving and the like sum for paying over, it is proper that they should receive that compensation for their services."

The manifest justice of compensating official services at the rate prescribed by law for such services at the time they were commenced caused the enactment of section 3331 of the Code of Civil Procedure, which prevents the various provisions therein contained as to the costs and fees of officers from affecting one who had been previously appointed and had entered upon the discharge of his duties with a statute in force prescribing a different rate of compensation. The section referred to declares that the fees provided by it for officers, receivers included (sec. 3320), shall not apply to an officer previously appointed and who had "commenced the performance of a service," but that such officer, when "a fee

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is allowed by the statute heretofore in force, and is entitled to the fee so allowed for the completion of that service" (*Woodruff* agt. *Imperial Fire Insurance Co.*, 90 *N. Y.*, 521). This section, as it only concerns the fees and compensation established by the Code, is not so directly applicable to the present case as to control it by force of the provisions, yet it is worthy of attention because it contains a distinct recognition of the principle which this opinion adopts, that the rate of compensation established by law for official services, when their discharge is undertaken, should control the final allowance, and that therefore subsequent legislation should not affect it unless directly and plainly made applicable. While, perhaps, it is not accurate to say that services performed at a rate of compensation prescribed by law must necessarily, per force of a contract, be paid at the rate established at the time of appointment, it can, nevertheless, be truly said that when the service has been completed and the work done on the faith of fees prescribed by a statute then in force, that a law which changes the amount to be paid for similar services should not be held applicable to it, unless expressly and plainly so declared. The case before us is one of that character. Mr. Newcomb has executed the responsible trust confided to his care with a fidelity and wisdom which are exceptional (*See report of Esek Cowen upon that subject*). After his trust is substantially ended and the compensation earned it is sought to fix his fees, by a law subsequently passed, at a rate below what he supposes an intelligent and faithful public officer would deem to be fair and reasonable, as required by the act of 1869. The work was done in the expectation and belief at least that the superintendent of insurance would fix the compensation. What sum that officer will award is not known. It is known, however, that he is a just and capable official and has special knowledge upon the subject, and that therefore, if the matter of compensation be confided to him, it is certain that the discretion will not be abused. The act of 1883 does not supersede, as to Mr. Newcomb, the provisions of the act

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of 1869 under which he was appointed. The former act (1883) has no retrospective operation for the reasons which have been given and the matter must be remanded to the superintendent of insurance with directions to fix the fees in accordance with the latter (1869).

There is another argument worthy of consideration tending to sustain the conclusion already reached. The act of 1869, under which Mr. Newcomb was appointed, related to a special kind or class of life insurance companies known as "registered companies," and as the title of the act shows (and also its provisions) was designed "to provide for the appointment of receivers of *such* depositing companies in *certain* cases." As that statute applies only to particular corporations of a certain general kind, and to the receiverships thereof, it is very questionable whether one applying "to receivers of corporations" generally affects it (*Matter of Wachter*, 62 How., 352, *affirmed at general term*; *Matter of Del. and Hud. Canal Co.*, 69 N. Y., 209). It is, however, unnecessary to flatly decide this proposition, but the line of argument suggested is worthy of careful thought and study, for it is a general rule of law, perfectly settled, that special legislation upon or in regard to particular subjects or persons is not affected by subsequent legislation touching the general class of subjects or persons to which the former belong, unless its express words and not merely general language cover them.

The conclusion already reached that the provisions of the law of 1883 are not applicable to the relator makes unnecessary the consideration of the second point made upon the argument of this motion and hereinbefore stated. As, however, the effect of legislation should be thoroughly understood it is proper to suggest some thoughts applicable thereto. The following question is thus naturally suggested: If the act of 1883, in its provision for receivers' fees, is applicable to the relator, does it do anything more than establish the *minimum* of the allowances?

In answering this question two things should be remem-

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bered: 1st. That repeals by implication are not favored in the law; and that (*using the words of ALLEN, J., In Matter of Comrs. of Cent. Park*, 50 N. Y., 497) "to work a repeal by implication the intent of the legislature must be very apparent or the two laws must be so incongruous and repugnant that effect cannot be given to both;" and, 2d. That the act of 1883 only repeals such "acts or parts of acts" as are "inconsistent" therewith. If, then, it is held that section 2 of the law of 1883 affects the fees of the relator to successfully defend this application, it must also be shown that the duty imposed by that of 1869 upon the superintendent of insurance to fix such fees at a sum not greater than five per cent upon the assets which shall come into his hands has been abrogated. Has that been done? The act of 1883 does not in terms limit the allowance of the receiver to the sums therein prescribed. How, then, can it be said that the two statutes are "so incongruous and repugnant that effect cannot be given to both," when the older prescribes a *maximum* of allowance and the latter does not, but simply provides that a receiver "shall be allowed to receive as compensation for his services" a sum less than the *maximum* made lawful by the former? Does not every sound rule of construction require that effect should be given to both statutes by holding that the act of 1869 fixes the *maximum* of compensation and that of 1883 the *minimum*, leaving the discretion of the superintendent between these two points unaffected and undisturbed? It was urged upon the argument that no such result was intended by the legislature. This is possibly so, but upon such a subject courts cannot guess. They have for their guidance certain well known rules of law, in reference to which all statutes are supposed to be passed. If an office is created by statute and fees are given, as a rule the compensation therein specified cannot be exceeded. But when an office has long existed, and a discretion within a prescribed *maximum* is confided to a court or an officer to fix the fees of its incumbent, it is very doubtful whether a subsequent statute which declares he shall

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receive a sum less than the *maximum* given by the old law can, without an express limitation of the allowance to the sum therein prescribed, take away the discretion given by the former act. The reason is contained in the language of judge ALLEN before quoted, and it is, that the two acts are not "so incongruous and repugnant that effect cannot be given to both."

It is, however, useless to pursue this discussion or to formally decide what effect should be given to the act of 1883 in a case to which its provisions in regard to receivers' fees may apply. It has already been held that it has no application to the case now under consideration. It is, nevertheless, proper to point out questions which are sure to arise under it as it now reads, and also to state that in cases of large trusts, and there are now several of that kind in the hands of receivers, receivers will probably receive under it, if it should be eventually held applicable to prior appointments, a very much larger compensation than they would if the discretion confided to the superintendent of insurance by the law of 1869 had been undisturbed, even though the compensation is limited to the sum which such act (that of 1883) establishes.

In conclusion it is necessary to state only that the application for the *mandamus* is granted, but without costs.

SUPREME COURT.

JONATHAN WOODRUFF, respondent, agt. CHARLES G.
SCHNEIDER, appellant.

Pleading — question of.

The defendant S. was charged in the complaint with having induced the plaintiff by false and fraudulent representations to accept certain worthless notes, for which a valid bond and mortgage were surrendered and satisfied. The complaint also charged that defendant S. with defendants Doe and Roe combined and confederated together in the perpetration of the fraud:

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Held, that an order striking out the allegation of conspiracy and the names of Doe and Roe from the action, being productive of neither harm nor embarrassment to defendant, the law will not permit him to effectually complain of it.

First Department, General Term, August, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order made during the trial at the circuit, striking out the allegations from the complaint alleging a conspiracy between the defendant and persons named John Doe and Richard Roe to defraud the plaintiff; and also striking their names from the action.

J. P. Solomon, for appellant.

A. Edward Woodruff, for respondent.

DANIELS, J.—The names stricken out of the title of the action had been inserted to represent persons whose names and individuality had not been discovered by the plaintiff. The charge was that those two persons, together with the appealing defendant, had combined and confederated together and by means of false and fraudulent representations induced the plaintiff to accept certain worthless notes, for which a valid bond and mortgage were surrendered and satisfied, Without the allegation connecting the two other persons with the transaction, the complaint contained a very full and complete statement of facts charging the present defendant with the perpetration of this fraud. And the action might very well have proceeded upon the issue taken by him in his answer to these allegations, without any reference whatever to those which were contained in the complaint, to bring in other parties to the action (*Code Civil Pro.*, sec. 1204).

The case was not one where the plaintiff could be required under the issue to make out any liability exceeding that of the defendant Schneider alone. It was not a case where the allegations of the conspiracy were essential in any respect to

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the right of the plaintiff to maintain the action (*Jones agt. Baker*, 7 *Cowen*, 445; *Forsyth agt. Edmonson*, 11 *Hun*, 408; *Verplanck agt. Van Buren*, 76 *N. Y.*, 247; *Love agt. Mumford*, 14 *Johns.*, 426).

For the purpose of the action the order from which the appeal has been taken was wholly unnecessary, and it was productive of neither harm nor embarrassment to the defendant. There was no legal ground upon which he could complain that it had been made. And as it apparently was entered to relieve the case of objections taken, and was fully justified by the circumstances, if any order whatever could have been deemed proper, the law will not permit the defendant to effectually complain of it.

It should accordingly be affirmed, with ten dollars costs besides disbursements.

DAVIS, P. J., and BRADY, J., concur.

SUPREME COURT.

HARRIET F. S. WHEELER and another agt. PHILIP BRAENDER.

Practice — Payment into court — Specific performance — When issue raised by the pleadings, must be disposed of before specific performance will be decreed.

Where an issue is raised by the pleadings, in an action for damages, as to the proper construction of an agreement, specific performance cannot be decreed, without disposing of this issue, on payment by defendant of money into court to secure plaintiff from the damages.

HAIGHT, J. — The defendants move for leave to pay into court such a sum of money as to the court may seem proper to secure the plaintiff from the damages alleged in the complaint; and upon the paying into court of such money that then specific performance of the contract alleged in the pleadings be adjudged.

Manken *et al.* agt. Pape.

I am of the opinion that this court has not the power, upon motion, to grant the relief asked for; that a trial is necessary. It is not a case in which the action can be severed under section 511 of the Code. I know of no other provision providing for the disposing of issues upon motion, except in cases of sham and frivolous pleading. In this case there is an issue raised by the pleadings as to the proper construction to be given to the agreement of Ward Wheeler to loan \$20,000. Specific performance cannot be decreed without disposing of this issue. This issue is separate and distinct from the one for damages, and can be disposed of only by trial.

Motion denied, with ten dollars costs.

CITY COURT OF NEW YORK.

CORD MANKEN *et al.* agt. HERMAN PAPE.

Judgment-debtor — Code of Civil Procedure, sec. 2436 — What is necessary to be shown to entitle a party to an examination of a judgment-debtor in aid of execution under this section.

An affidavit to obtain an order for the examination of a judgment-debtor in aid of execution, which states as a ground for such examination "that as deponent is informed and believes the said defendant has property which he unjustly refuses to apply towards the satisfaction of the judgment," is insufficient to authorize the order.

The affiant should give the name of his informant with his means of knowledge, and shall describe the property and also allege a demand.

Special Term, August, 1883.

MOTION to dismiss the proceedings.

B. Lewinson, for motion.

McADAM, J. — An affidavit to obtain an order for the examination of a judgment-debtor in aid of execution, which states as a ground for such examination "that as deponent is

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informed and believes the said defendant has property which he unjustly refuses to apply towards the satisfaction of the judgment," is insufficient to warrant the order, for the reasons :

1. The affiant fails to give the name of the informant with his means of knowledge, so that the court may determine whether the information is entitled to credit as proof.

2. The character of the property is not described. This is an important omission, because the examination of a debtor before the return of an execution can only be had where the property which he refuses to apply is concealed or is not subject to levy (10 *How. Pr.*, 560).

3. It is defective because the affidavit does not allege a demand (13 *Hun*, 232).

In short the affidavit should show facts and circumstances, in order that the judge may decide whether there has been an unjust refusal (13 *Hun*, *supra*). The plaintiffs have not made out a case entitling them to the order (17 *How. Pr.*, 512), which will be vacated, with ten dollars costs to be credited on the judgment.

U. S. SUPREME COURT.

THE ST. PAUL AND CHICAGO RAILWAY COMPANY, plaintiff in error, agt. SAMUEL McLEAN.

Practice as to removal of causes from a state court—When within the legal discretion of the federal court to remand—When party not entitled to file in the state court a second petition for removal.

Where, upon the removal of a cause from a state court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the federal court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised.

If, upon the first removal, the federal court declines to proceed and

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remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled, under existing laws, to file in the state court a second petition for removal upon the same ground.

August, 1883.

In error to the circuit court of the United States for the southern district of New York.

Bangs & Stetson, for reversal.

D. M. Porter, for affirmance.

HARLAN, *J.*—This action was brought in the court of common pleas for the city and county of New York, by Samuel McLean, a citizen of that state, against the St. Paul and Chicago Railway Company, a corporation of the state of Minnesota. After answer, the action was, upon the petition of the defendant, accompanied by a proper bond, removed for trial into the circuit court of the United States for the southern district of New York. The sole ground of removal was that the case presented a controversy between the citizens of different states. The removal was had before the term at which the cause could have been first tried in the state court. The first day of the next session of the federal court, succeeding the removal, was the 7th day of April, 1879. But the copy of the record from the state court was not filed in the federal court until April 10, 1879, on which day, upon motion of the attorney for the company, an *ex parte* order was made stating the filing of such copy, the appearance of defendant, and that the action should proceed in that court as if originally commenced therein. Subsequently, April 14, 1879, the plaintiff, upon notice to defendant, moved the court to remand the cause for the failure of the defendant to file a copy of the record and enter his appearance within the time prescribed by statute. This motion was resisted upon the ground, supported by affidavit, that it was by inadvertence

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that the record was not filed in the federal court in proper time, and that counsel did not discover that fact until April 10, 1879, when it was filed, and notice thereof on the same day given to plaintiff's attorney. This motion to remand was granted by an order entered May 24, 1879.

On the 28th of May, 1879, the company filed in the state court a second petition, accompanied by the required bond, for the removal of the action into the federal court upon the same grounds as those specified in its first petition. A copy of the record was promptly filed in the federal court, but the cause, upon motion of plaintiff, was again remanded by an order entered December 27, 1879.

The present writ of error brings before this court both of the orders of the circuit court remanding the cause to the state courts.

In removal cases (100 *U. S.*, 474) the court had occasion to construe the act of March 3, 1875, determining the jurisdiction of circuit courts of the United States and regulating the removal of causes from state courts. The court there said, speaking by the chief justice: "While the act of congress requires security that the transcript shall be filed on the first day, it nowhere appears that the circuit court is to be deprived of its jurisdiction, if by accident the party is delayed until a later day of the term. If the circuit court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected." In reference to this language, it was said in *Railroad Company agt. Koonz* (104 *U. S.*, 16): "This was as far as it was necessary to go in that case, and in entering, as we did then, on the construction of the act of 1875, it was deemed advisable to confine our decision to the facts we then had before us." In the latter case, it was further determined that "if the petitioning party is kept by his adversary, and against his will, in the state court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment

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and an order for the allowance of the removal, enter the cause in the circuit court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered."

In *National Steamship Company agt. Tugman*, at the present term, it was ruled that upon the filing of the petition for removal, accompanied by a proper bond—the suit being removable under the statute—the jurisdiction of the federal court immediately attached in advance of the filing of a copy of the record; and whether that court should retain jurisdiction, or dismiss or remand the action because of the failure to file such copy, was for it, not for the state court, to determine.

These cases abundantly sustain the proposition that the failure of the defendant to file the copy on or before the first day of the succeeding session of the federal court, does not deprive that court of jurisdiction to proceed in the action, and that whether it should do so or not upon the filing of the copy is for it to determine. In this case it was undoubtedly within the sound legal discretion of the circuit court to proceed as if the copy had been filed within the time prescribed by statute. But clearly it had a like discretion to determine whether the reasons given for the failure to comply in that respect with the law were sufficient. We do not say that in the exercise of that discretion the court may not commit an error which would bring its action under the reviewing power of this court. But since the question whether the cause should be remanded for failure to file the necessary copy in due time is one of law and fact, its determination to remand, for such a reason, should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised.

We perceive no ground whatever to question the correctness of the order of May 28, 1879, or to conclude that there was any abuse by the court of its discretion. The only reason given for the failure to file the transcript within proper

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time was inadvertence upon the part of counsel; in other words, the filing was overlooked. It is scarcely necessary to say that this did not constitute a sufficient legal reason for not complying with the statute. At any rate, the refusal of the court to accept it as satisfactory cannot be deemed erroneous.

But it is contended that the order of December 27, 1879, remanding the cause, was erroneous, because the copy, upon the second petition for removal, was filed in the federal court within due time after that petition, with the accompanying bond, was presented in the state court. Assuming that the second petition for removal was filed before or at the term at which the cause could have been tried in the state court, we are of opinion that a party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where, upon the first removal by the same party, the federal court declined to proceed and remanded the suit, because of his failure to file the required copy within the time fixed by the statute. When the circuit court first remanded the cause—the order to that effect not being superseded—the state court was reinvested with jurisdiction, which could not be defeated by another removal upon the same grounds and by the same party. A different construction of the statute, it can be readily seen, might work injurious delays in the preparation and trial of causes.

Judgment affirmed.

American Society for the Prevention of Cruelty to Animals agt. Doyle.

SUPREME COURT.

THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY
TO ANIMALS agt. CHARLES F. DOYLE.

*Cohoes (city of)—Fines imposed and collected for offenses under section 6,
chapter 12, Laws of 1874 — Who should receive.*

The fines imposed and collected for offenses under section 6 of chapter 12, Laws of 1874, should be received by the Society for the Prevention of Cruelty to Animals.

But an action cannot be sustained against the recorder of the city of Cohoes, who has in good faith paid over the money so received by him for such fines to the chamberlain of such city before any demand was made therefor by the plaintiff.

Rensselaer Special Term, August, 1883.

ACTION by plaintiff to recover certain fines imposed and collected by the defendant as recorder of the city of Cohoes.

E. L. Fursman, for plaintiff.

Charles F. Doyle, in person, for defendant.

INGALLS, J. — Considering the general nature of the language employed in framing section 6 of chapter 12, Laws 1874, and regarding the purpose obviously sought to be accomplished by such statute and others relating to the same subject, and the humane and beneficial purpose contemplated thereby, I think it may fairly and reasonably be inferred that the legislature intended that the fines imposed and collected for offenses within the purview of such statute, should be received by the society designated in such statute and applied in furtherance of the objects sought to be promoted thereby.

The offense in punishment of which the fines in question were imposed is clearly within the spirit and, I think, the language of the statute referred to, and I fail to discover any statute which otherwise so disposes of such fines as to defeat the plaintiff's claim thereto. I therefore conclude that they

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must inure to the benefit of the plaintiff according to the terms of such statute, and that the society is entitled thereto.

I am, however, convinced that this action cannot be sustained against the defendant herein, who seems in good faith to have paid over the money so received by him to the chamberlain of the city of Cohoes before any demand was made therefor by the plaintiff.

The defendant was and is an officer of this city, and by its charter required to pay over to its chamberlain all moneys received for fines ; and the money in question was by him paid over in obedience to that injunction. It seems to me that the words "belonging to the city," employed in the thirty-second section of the charter, were intended merely to distinguish between certain fines which the recorder is thereby permitted to receive and detain ; and those costs, fees and fines, which he is required to account for and pay over. I do not think it was intended to allow the recorder to retain in his custody the fines by him imposed and collected, with a view to determine whether some claim might not possibly be made thereto by some person or society other than the city. When he accounted for the money and paid it over he acted in the line of his duty as such officer, and is entitled to protection.

I perceive that the claim which was prepared and verified purports to be asserted against the city of Cohoes, and not against the defendant. My attention has been directed to the case of *Murphy* agt. *Ball* (38 *Barb.*, 262). I do not regard the doctrine of that case controlling under the facts developed in this action. In this case the fines were received by the recorder as an officer of the municipality and placed in its treasury, and duly, through the operation of the machinery of such city government, the money reached its proper destination, subject to such claims of other parties as the law recognizes which should be asserted against the city.

The complaint must be dismissed, with costs, upon the ground above stated, but without prejudice to any action or proceeding which the plaintiff may deem proper to institute.

Matter of Brown.

SURROGATE'S COURT.

In the Matter of the Judicial Settlement of the Account of ISAAC F. BROWN, executor, &c., of DEBORAH ORSER, deceased.

Costs and allowances in surrogate's court — Code of Civil Procedure, sections 2561, 2562 — What costs and allowances may be made under these sections.

Costs can only be awarded to a party and not to counsel or attorneys. If a party have a dozen counsel he can be awarded no more costs than if he had but one.

Under section 2561 of the Code of Civil Procedure, in case of a contest, the limit which the surrogate cannot exceed in awarding costs is seventy dollars, and in addition ten dollars per day, less two, for each day actually occupied on the trial upon the merits. The time which may have been spent by an attorney in preparing pleadings, making briefs, ascertaining facts, appearing merely where the case is for any cause adjourned, and appearing to settle the decree, can none of them be regarded as any part of the trial or hearing upon the merits for which a per diem allowance can be made under that section. But a summing up or argument made to the court must be regarded as a hearing upon the merits.

Under section 2563 of the Code of Civil Procedure executors and administrators may in addition be awarded such a sum as the surrogate decrees reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial.

In order that the surrogate may act understandingly in making an allowance, under section 2561, an affidavit should be presented specifying the number of days occupied in the trial or hearing upon the merits. The affidavit to be presented on the part of an executor should, in addition, state separately the number of days necessarily spent in preparing the account for settlement, and the number of days consumed in preparing for trial; that a gross number of days have been occupied in making up and preparing the accounts of the executor, in preparing for trial and in the actual trial, is not sufficient. The number of days occupied in each class of work should be stated.

In all cases a bill of costs, allowances and disbursements should be prepared precisely as is the practice in the supreme court, and notice of

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taxation be given in the cases and manner required by that court. The stenographer's fees should be paid by the proper party, and the amount be included in the disbursements, &c., in his bill of costs, the same as if they were referee's fees in the higher courts.

Westchester county, April, 1853.

PREPARATORY to settling the decree in this matter applications were made for allowance under the decision, which awarded costs to all parties out of the fund. Two counsel represented the executor on the trial, each of whom presents an affidavit stating that twenty-seven days were spent in the matter. Each presents a bill of costs for seventy dollars, allowable in a case of contest, and for \$270 as a per diem allowance. The items of disbursement, amounting to sixty-six dollars, are stated and verified in a separate paper.

The contestants' counsel presents an affidavit showing seventeen days occupied in the matter, of which six were devoted to the trial upon the merits and two days to the summing up of counsel. The disbursements claimed by the contestants, amounting to about twenty dollars, are likewise stated in a separate paper. No bill of costs as such was presented by either party for taxation, and nothing is said by either about stenographer's fees.

N. H. Baker and F. Larkin, for executor.

Charles M. Hall, for contestants.

COFFIN, S. — Costs can only be awarded to a party and not to counsel or attorneys. If a party have a dozen counsel he can be awarded no more costs than if he had but one.

Under section 2561 of the Code, in case of a contest, the limit which the surrogate cannot exceed in awarding costs is seventy dollars, and in addition ten dollars per day, less two, for each day actually and necessarily occupied in the trial upon the merits. The time which may have been spent by an attorney in preparing pleadings, making briefs, ascertaining facts, appearing merely when the case is for any cause

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adjourned, and appearing to settle the decree, can none of them be regarded as any part of the trial or hearing upon the merits for which a per diem allowance can be made under that section. But a summing up or argument made to the court must be regarded as a hearing upon the merits.

According to the affidavit presented on the part of the contestants, six days were occupied in taking testimony and two days in summing up. The extent, therefore, of costs which can be granted to the contestants is seventy dollars, and ten dollars per day, less two, for the trial or hearing upon the merits, making sixty dollars, in all \$130. Other compensation for services of that counsel, and he is doubtless entitled, for the faithful and zealous manner in which he has labored, to much more, his clients must pay. The rule is the same here in this respect as in the supreme court. The statute prescribes and limits the amount of costs as between party and party, or as between the parties and the fund, which may be allowed. Beyond that the question of adequate compensation is between counsel and client, as already stated.

The rule, as fixed by the above section, is precisely the same as to executors and administrators, and they can be allowed thereunder no greater compensation than may be granted to the contestants; but from reasons not necessary to be considered here they may, in addition, be awarded, under section 2562, "such a sum as the surrogate decrees reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial." In order, therefore, that the surrogate may be enabled to act understandingly in making an allowance, under the section first referred to, an affidavit should be presented specifying the number of days occupied in the trial or hearing upon the merits. The affidavit presented on the part of the executor should, in addition, state separately the number of days necessarily spent in preparing the account for settlement and the number of days consumed in preparing for the trial.

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The contestant's affidavit is sufficiently full, but those presented by the executor are too general and vague in this respect. A gross number of days they state have been occupied in making up and preparing the accounts of the executor in preparing for the trial, and in the actual trial. The number of days occupied in each class of work should be stated. It is true there has been added, on suggestion, to the affidavit of one of the executors' counsel a clause to the effect that, as near as he can ascertain, he has been actually engaged in the trial fourteen days. This is an estimate, and is not so satisfactory as the positive affidavit on the part of the contestants, which shows that there were only eight days so spent. I will, therefore, award the same sum to the executor, under section 2561, as to the contestant, namely, \$130. That is the utmost limit under that section. But under the next section the executor may be granted an allowance for the two days which are precluded by the former. This I am disposed to do. I am embarrassed, however, as to what allowance to make for preparing for the trial as the affidavits do not, as already stated, furnish sufficient *data*. The affidavits on his behalf, it is true, show twenty-seven days occupied in the matter altogether, while that on behalf of the contestant shows only seventeen. How many more days when mere adjournments were had in the presence or absence of parties does not appear. However that may be, I am inclined to think it will not be far out of the way to grant to the executor ten dollars a day for the two days referred to above, the same amount for two days in preparing the account, and also for three days in otherwise preparing for the trial. This will make altogether \$200. The disbursements and expenses of the executor are fixed at sixty-four dollars and forty-six cents, those of the contestants at nineteen dollars and forty-four cents, without regard to stenographer's fees.

It may be proper to remark that in all cases a bill of costs, allowances and disbursements should be prepared precisely as is the practice in the supreme court, and notice of taxation be

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given in the cases and manner required by that court. The stenographer's fees should be paid by the proper party and the amount be included in the disbursements, &c., in his bill of costs, the same as if they were referees' fees in the higher courts.

N. Y. COMMON PLEAS.

WILLIAM B. TULLIS agt. CHESTER BUSHNELL and others.

Attorney's lien — Under section 66 of the Code of Civil Procedure — Mode of enforcing it.

Where a plaintiff, without paying the fees of his attorney, before there has been any verdict, report, decision or judgment in plaintiff's favor, effects a settlement with the defendant, the attorney cannot maintain an action against his client and the defendant in the original suit on the ground that by the settlement "his lien upon the cause of action" had been destroyed.

He must take the same steps and establish his lien by the continuance of the action, notwithstanding the settlement, as before the adoption of the sixty-sixth section of the Code, except that he is not, under that section, required to show that the settlement was a fraud upon him; and the leave to prosecute the action should be granted if the settlement inequitably affected his lien upon the cause of action.

General Term, July, 1883.

Before VAN BRUNT, BEACH and VAN HOESEN, JJ.

IN 1880 Mr. C. A. Runkle was made trustee for the distribution of stock of the Mercantile Paper Bag Manufacturing Company, amounting to about \$150,000. In July of that year Chester Bushnell, by William B. Tullis, as his attorney, brought suit against the company, John Bridgford, David W. Seely, and Mr. Runkle as trustee, for about \$8,000 of the stock. Mr. Bushnell sought to settle the suit with Mr. Bridgford. The latter, upon advice of Mr. Runkle, refused to compromise until Mr. Bushnell's attorney had been paid his

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fees. Mr. Bushnell afterwards said that he had settled with Mr. Tullis, and thereupon Mr. Bridgford agreed to give Mr. Bushnell \$4,000 of his own stock in settlement of the suit, which, however, was not discontinued, Mr. Tullis claiming that Mr. Bushnell had not paid him his fees, amounting to about \$500, brought this action against his client Bushnell, and all the defendants in the original suit, on the ground that by the settlement his lien upon the cause of action had been destroyed. A demurrer to the complaint was overruled by the special and general terms. The action was then tried against all the defendants, and a verdict given for the full amount claimed.

J. H. Drake and G. Wilson, for plaintiff.

Henry L. Clinton, C. A. Runkle and Henry W. Sackett, for defendants.

VAN BRUNT, J.—I do not see upon what principle the judgment in this action can be sustained.

Prior to the adoption of section 66 of the Code of Civil Procedure, an attorney had a lien for his costs and charges upon the papers, deeds and other evidences of debt in his hands belonging to his client, and also upon any money which he may have collected at his client's request, but he had no lien or interest whatever in the cause of action by reason of his employment to prosecute the same.

After judgment the attorney had a lien thereon to the extent of his costs, and for such further sum as the client had promised to pay him out of the judgment as compensation for his services (*Wright agt. Wright*, 70 N. Y., 96; *Coughlin agt. The N. Y. C. and H. R. R. R.*, 71 N. Y., 43).

Before judgment the parties to an action had a right to settle the same on such terms as they might agree upon without consulting with the attorney to the record, provided they acted in good faith and had no intention to cheat or defraud the attorney out of his costs, but if the settlement was

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entered into with such view, then the court, upon the application of the attorney, would interfere and make inquiry into the circumstances of the settlement, and if found to be fraudulent would set the same aside so far as to allow the suit to proceed for the purpose of collecting the attorney's costs (*Talcott agt. Brownson*, 4 *Paige*, 501).

Section 66 of the Code of Civil Procedure extends the attorney's liens to the client's cause of action, which lien attaches to the verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement by the parties before or after judgment.

In the case at bar, there having been no verdict, report, decision or judgment in favor of the plaintiff at the time of the settlement, the lien is still confined to the original cause of action which has been placed in his hands for collection.

I cannot see but that the attorney must take precisely the same steps to establish his lien by a continuance of the action notwithstanding the settlement under the sixty-sixth section of the Code as was decided to be the practice prior to the adoption of that section in respect to an attorney's lien for costs — namely, that of the settlement as in fraud of his lien, the court will grant leave to the attorney to prosecute the action for the purposes of determining his right to a recovery as against the defendant in the action and for the purpose of establishing his lien upon the subject-matter of the action. The only difference which the sixty-sixth section, perhaps, may have made in the position of the attorney, is that he is not, under section 66, required to show that the settlement was a fraud upon him, as he was, prior to the adoption of that section, required to do, but that the leave to prosecute the action should be granted if the settlement inequitably affected his lien upon the cause of action. This seems to have been the rule which was recognized in the case of *Goddard agt. Trenbath* (24 *Hun*, 182), *Wilber agt. Baker* (24 *Hun*,

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24), *Jenkins* agt. *Adams* (22 *Hun*, 600), and *Dinneck* agt. *Cooley* (3 *N. Y. Civ. Pro. Rep.*, 141).

It is true that the general term of this court has decided that the complaint of the plaintiff was sufficient, but the allegations contained in the complaint were not entirely sustained upon the trial. There was no proof in the case as alleged in the complaint that any lien of the plaintiff in this action was destroyed by the settlement in question, for the reason that there was no proof by his having proceeded to judgment that any lien actually existed.

I am of the opinion, therefore, that no cause of action was shown upon the evidence, and the motion to dismiss the complaint should have been granted.

The judgment appealed from should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

BEACH and VAN HOESSEN, JJ., concurred.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
JOHN SWINBURNE agt. MICHAEL N. NOLAN.

Office and officer — Action against the usurper of an office — Damages how recovered — Final judgment in action for usurping office — When and how fine to be imposed — Code of Civil Procedure, sections 1953, 1956.

Under section 1953 of the Code of Civil Procedure, by proceedings in the action subsequent to final judgment upon the right and in favor of the person alleged to be entitled to the office, the person thus found entitled to the office may recover in the same action against the defendant the damages which he has sustained in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.

Upon such proceeding in the action, though subsequent to the verdict and judgment upon the title to the office, the defendant is entitled to a hearing and trial.

Section 1956 in terms authorizes the court to impose in an action of this

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character, a fine, but to justify the imposition, the court should have before it evidence showing that the defendant has been guilty of some act in taking or holding the office from which he has been evicted, which was criminal, or, at least, grossly improper.

It was assumed in the enactment of section 1956 that the evidence given upon the trial of the action would place the court in possession of all the facts upon which it would act, and if the proof given upon the trial shows nothing to justify the imposition of a fine, there is no procedure given to supply the omission.

Albany, Special Term, June, 1883.

Matthew Hale and Henry Smith, for plaintiff.

Edward Countryman, for defendant.

WESTBROOK, J.—Four days ago (June 25, 1883) a verdict was rendered in the above action (the defendant making no defense) establishing the title of the relator, John Swinburne, to the office of mayor of the city of Albany, and that he was elected to that office at the charter election in April, 1882.

The court has already held that under section 1953 of the Code, by proceedings in the action subsequent to “final judgment * * * upon the right, and in favor of, the person alleged to be entitled” to the office, “the person thus found entitled to the office (John Swinburne) may recover in the same action, against the defendant, the damages which he has sustained, in consequence of the defendant’s usurpation, intrusion into, unlawful holding, or exercise of the office.”

The court further held, for reasons then stated, and which were so palpable as to command the assent of plaintiff’s counsel, that upon such proceeding in the action, though subsequent to the verdict and judgment upon the title to the office, the defendant was entitled to a hearing and trial, provision for which has already been in part made by a rule entered.

The plaintiff’s counsel now asks for an inquiry, and an order directing it, by the court, into all the facts and circumstances of the election to the end that the court may impose a fine upon the defendant for the benefit of the people, as it

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is authorized to do by section 1956 of the Code of Civil Procedure.

That section provides that where "a defendant is adjudged to be guilty of usurping or intruding into, or unlawfully holding or exercising an office, franchise or privilege, final judgment must be rendered ousting and excluding him therefrom, and in favor of the people or the relator, as the case requires, for the costs of the action; as a part of the final judgment the court may, in its discretion, also award that the defendant, or where there are two or more defendants, that one or more of them pay to the people a fine not exceeding two thousand dollars. The judgment for the fine may be docketed, and an execution may be issued therefrom in favor of the people, as if it had been rendered in an action to recover the fine. The fine, when collected, must be paid into the treasury of the state."

This section in terms authorizes the court to impose, in an action of this character, a fine; but as fines are only imposed as punishment for misconduct, it is clear that to justify the imposition, the court should have before it evidence showing that the defendant has been guilty of some act in taking or holding the office from which he has been evicted which was criminal, or, at least, grossly improper. Nothing hinting or imputing anything of that character was shown upon the trial. It simply then appeared that the defendant had taken the office and exercised the functions of mayor of the city of Albany in obedience to the result of the election, as officially declared by legal authority. It is true that the verdict has declared that official declaration to be erroneous, but nothing whatever has yet been shown that the defendant's conduct has been otherwise than proper and becoming. Indeed, all this the present motion concedes, for it asks that the court shall, on a day to be named and fixed, proceed to inquire into the election, and its conduct, with a view to ascertain whether or not the defendant has been a participant in any fraud or misconduct. The court declines to enter upon any such inquiry, for the following reasons :

The People *ex rel.* Swinburne agt. Nolan.

First. No warrant for such a procedure can be found in any work or practice, or in any adjudged case to which the attention of the court has been directed, and diligent search by it for a precedent to justify the course which has been urged, has failed to find one.

An inquiry of the character suggested would be as tedious and as costly as a trial of the action, had it been fully contested. In the enactment of the section of the Code which has been given, which is a substantial copy of the Revised Statutes (2 *Edm.*, 606, *sec.* 48), it is not believed that any such proceeding was intended. It was assumed that the evidence given upon the trial of the action would place the court in possession of all the facts upon which it would act, and if the proof given upon the trial shows nothing to justify the imposition of a fine, there is no procedure given to supply the omission.

Second. The section of the Code affirmatively shows that no such proceeding would be proper. It provides for a final judgment upon the verdict with the "costs of the action," and "as a part of the" (*such*) "final judgment" it authorizes the imposition of the fine. That final judgment has been given, and no authority exists for a proceeding of this character after judgment. Even though the formal roll has not been made up, the connection which the section throughout maintains between the right to enter the judgment with costs, after the verdict, and as a part of it, to provide for a fine, shows that the statute was formed upon the supposition that the court would, when the verdict was rendered, be in possession of all the facts upon which to act in regard to the imposition of the fine. Nothing whatever contained in the section will warrant any such inquiry as that to which the court, by the proposed order, is invited.

Third. It is true that the court, after "final judgment" upon the title to the office had been rendered, has ordered an inquiry as to the damages which the relator has sustained by being kept out of possession of the office, but that is by force

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of section 1953, which allows a recovery "in the same action," of such damages after "final judgment has been rendered upon the right and in favor of the person alleged to be entitled to recover." No such provision is contained in section 1956, upon which this application is made; on the contrary, such "final judgment" establishing the title of the relator to the office must contain the fine, if one be imposed, and such "final judgment" is the one to be "rendered" prior to the inquiry as to the damages under section 1953. Indeed, the provision by section 1953 for the recovery of the damages after "final judgment" and the failure to provide for one of the character now asked for, strengthens the conclusion already announced, that such an inquiry is unauthorized.

The reasons which have been briefly stated lead to the following conclusions: First. That no facts have been shown to justify the imposition of any fine upon the defendant; and, second. That the court has no power to institute the inquiry proposed; and that if it had such power, the costs and expenses of the long examination, which must necessarily be incurred by the parties and the county of Albany in the prosecution thereof, forbid, in the exercise of a sound discretion, any attempt to enter thereupon.

N. Y. COMMON PLEAS.

THE MAYOR agt. DECKER.

Jurisdiction of district courts — No jurisdiction in actions to recover penalties fixed by the dock department — Code of Civil Procedure, section 3215.

The district courts have no jurisdiction in actions to recover penalties fixed by the dock department for neglect to remove merchandise from a dock or pier.

General Term, June, 1883.

Before DALY, C. J., and VAN HOESEN, J.

The Mayor agt. Decker.

VAN HOESSEN, *J.* — Section 3215 defines the jurisdiction of the district courts of the city of New York; and whether or not a district court has jurisdiction of this action is to be determined by a reference to that section, for it is conceded that nowhere else can be found any statutory provision that gives to district courts jurisdiction of an action to recover a penalty.

Subdivision 2 of that section provides that a district court shall have jurisdiction of an action to recover the penalty given: First. By the charter of the city of New York. Second. By any by-law or ordinance of the common council of that city; or, third. By a statute of the state.

It will be seen that a distinction is made between a penalty created by a statute and a penalty created by a by-law or an ordinance. If a penalty created by an ordinance, passed in pursuance of an authority conferred by statute, were, as the corporation counsel contends, a penalty given by statute, the legislature would not have drawn that distinction, and all that the section would have contained would have been a grant of jurisdiction in an action to recover a penalty given by a statute. The charter of the city of New York gave no penalty for a neglect to remove merchandise from a wharf or pier, it merely authorized the dock department to fix penalties for disobedience of its orders, rules and regulations. In pursuance of this authority the dock department made a regulation that required the removal of merchandise from a wharf, pier or bulkhead within twenty-four hours after the corporation wharfinger orders such removal, and prescribed a penalty for a neglect or refusal to comply with the wharfinger's order.

It is obvious that this penalty was not given by a statute, by the charter of the city, or by any ordinance of the common council. A district court had not, therefore, jurisdiction of the action.

We decline to enlarge the jurisdiction of the district courts by construction, as the corporation counsel urges us to do, though we see no reason why an application should not

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be made to the legislature for an amendment to the Code that will give to the district courts jurisdiction of this class of cases.

Judgment affirmed.

N. Y. SUPERIOR COURT.

CANADA STEAMSHIP COMPANY (Limited), respondent, agt.
WALTER S. SINCLAIR, appellant.

*Examination before trial — Privilege of witness — When privilege to be urged —
Mere possession of stolen goods not necessarily inconsistent with innocence.*

A refusal to answer a question on the ground of the tendency thereof to convict of a crime is a personal privilege of the witness, and to be urged when the question is put.

Unless it appear that the testimony sought by an examination before trial relates exclusively to facts which, if proven, would show that the witness was guilty of a crime, the order therefor will not be set aside.

The mere possession of goods which have been stolen, not being necessarily inconsistent with innocence of the crime of "receiving stolen goods," a witness should be left to urge his privilege, if it exist, on the examination itself.

General Term, May, 1883.

Before INGRAHAM and TRUAX, JJ.

APPEAL from an order of the special term denying motion of defendants to vacate an order for the examination of defendants to enable plaintiff to frame the complaint in this action.

Richard S. Newcomb, for appellant.

C. Stewart Davison, for respondent.

INGRAHAM, J.— From the affidavit on which the order for the examination of the defendants was granted, it appears that plaintiff had, as common carrier, a special property in thirty-one bales of rubber which was stolen from the plain-

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tiffs about January 10, 1883, and some portion of which was thereafter in possession of defendant. That the action was commenced to recover the return of the property or the value thereof from the defendant, and that it was impossible for plaintiff to allege the number of the bales that came into possession of the defendants or the weight of the rubber or to properly frame the complaint without the examination of defendants. On the affidavit the defendants moved to vacate the order for the examination of the defendants, which motion was denied, and from that order denying such motion the defendants appeal.

The ground upon which it is claimed that the order should be reversed is "that the testimony to be given would make the defendants liable to indictment for receiving stolen goods."

The possession of goods that have been stolen is not of itself a crime. The crime is only committed where a person buys or receives property stolen from another, knowing the same to have been stolen (2 R. S. [Edm.], 700, sec. 71). The right of a witness to object to answer to a question which would tend to convict him of a crime is a personal privilege and should be urged when he is asked the questions having such a tendency. It is not sufficient ground for setting aside an order for his examination unless it should appear that the testimony which the party seeks to obtain relates exclusively to facts which, if proven, would show that the witness was guilty of a crime.

In this case the object of the examination is to identify the goods stolen from the plaintiff, which, it is claimed, came into the possession of the defendant. That of itself would not be a crime, it would undoubtedly be one of the facts which it would be necessary to prove to convict of the crime of receiving stolen goods; but, as the fact is consistent with the innocence of the defendant, I am of the opinion that the objection should be left to be passed on upon the examination itself (*Patterson agt. Sanford*, 45 N. Y. Super. Ct., 127).

The order should be affirmed, but without costs.

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TRUAX, J.—I concur in this result, because I think that in this particular case the defendant should be left to take the objection upon the examination.

N. Y. COMMON PLEAS.

In the Matter of a final Accounting of FERDINAND JUNG, as assignee of SAMUEL ROSENBACK and ISAAC LAUTERBACH.

MOSES MAY, appellant, agt. FERDINAND JUNG, respondent.

The assignment law — When party to a decree in equity, upon an accounting by an assignee, cannot docket a judgment personally against the assignee as a matter of course.

A party to a decree in equity, upon an accounting by an assignee for the benefit of creditors which adjudges that the assignee has in his hands a certain sum of money out of which he is directed to pay certain sums, cannot docket a judgment personally against the assignee as a matter of course (J. F. DALY, J., *dissenting*).

General Term, May, 1883.

Before DALY, Ch. J., VAN BRUNT and J. F. DALY, JJ.

APPEAL from an order of the special term vacating an order for the examination of respondent in supplemental proceedings.

Respondent was an assignee of Samuel Rosenback and Isaac Lauterbach. Appellant was a creditor of the assignors and cited respondent to account, as such assignee, under the provisions of the general assignment acts of 1877 and 1878. The respondent, upon petition, obtained a general citation to all persons interested to attend his final accounting, and such proceedings were had, that on June 17, 1881, a decree was made and filed on application of respondent and with consent of appellant by which respondent was ordered to pay a dividend of ten per cent to creditors out of the sum of \$14,000.63

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found to be in his hands, as assignee, the sums ordered to be paid to appellant being \$1,789.82 on one claim and \$899.10 upon another. On December 21, 1881, appellant procured a judgment for \$2,688.92, the aggregate of said sums, to be docketed in his favor against respondent on the basis of said decree, and issued execution thereon to the sheriff of the city and county of New York, which execution was returned wholly unsatisfied. Appellant procured an order for the examination of respondent in supplementary proceedings, which order was vacated by the court on the grounds: First. That the judgment was entered against respondent as assignee, not personally. Second. That the appellant had signed a composition agreement with the assignors prior to the entry of the decree and had accepted a cash payment thereunder.

It appeared that while the accounting proceedings above referred to were pending before the referee, to whom the assignee's accounts had been referred, the appellant with other creditors agreed to a composition of twenty-five per cent, fifteen in cash and ten in notes, and received the cash on May 5, 1881. The notes were tendered subsequently, but he refused to receive them. The appellant says he signed the composition agreement upon the representation that it was exclusive of the dividend he was to receive upon the accounting. The respondent alleged that the composition was based on the accounts then in process of settlement.

It was also shown that a proceeding by motion had been instituted by respondent on December 22, 1881, to have the execution set aside on the ground that the decree in favor of appellant had been paid and satisfied; that the court referred to a referee the question of facts, but that the proceeding was dismissed by consent before any determination was arrived at, and the decree and judgment are still in force and the execution has not been set aside.

Ira Leo Bamberger, for appellant.

Mr. Stilwell, for respondent.

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VAN BRUNT, *J.*—I entirely fail to see by what authority a party to a decree in equity, upon an accounting by a trustee which simply adjudges that the trustee has in his hands, as trustee, a certain sum of money out of which he is directed to pay certain sums, can docket a judgment personally against the trustee as a matter of course. It is true that the assignment law provides that the decree shall be entered, docketed and enforced the same as if made in an original action brought in the county court, but it certainly was not intended that any different course should be pursued than if an action had been commenced in a court of equity against a trustee as such for an accounting. In such an action no individual judgment against the trustee as such can be entered unless provision was made therefor in the decree.

In the case at bar there is not the slightest hint in the decree but that the assignee has not the money to pay the amount directed to be paid, and, without any neglect or default upon his part being brought to the notice of the court, a judgment is docketed against him individually and execution issued against him individually.

If this is the practice under the assignment act, then the moment a decree is entered upon the accounting of an assignee directing the assignee to pay out of his hands certain moneys to creditors, each creditor has the right to docket a judgment at once against the assignee individually and issue execution against his individual property, no matter how willing the assignee may have been to pay the claims against the estate.

No trustee has ever been placed in this position before, and it does not seem to me that the assignment act was ever intended to work such an injustice. What the power of the court might be upon its being shown that an assignee had not complied with its decree, it is not necessary to determine; but that an assignee was intended to occupy a relation so different from that of every other trustee in the method of enforcing decrees against them does not seem to be possible.

It is a familiar principle that a trustee is not liable indi-

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vidually unless he has been guilty of a breach of trust; but in the case at bar he is condemned and executed without ever having had an opportunity of being heard upon the subject as to whether or not he had been guilty of a breach of trust. A breach of trust in general creates only a single contract of debt, and must be enforced as such; but when the trustee has, under seal, covenanted to apply the trust fund according to the trusts declared, a breach of that engagement would create a special debt against them (*Hill on Trustees*, 519).

If this is the rule, it seems to be clear that a trustee cannot be charged individually as for a breach of trust without having an opportunity to be heard.

I am of the opinion that the judgment entered against Ferdinand Jung was void, the clerk having no authority to enter the same, and the order appealed from should be affirmed.

DALY, C. J.—I concur with you that the order appealed from be affirmed.

J. F. DALY, J. (dissenting). — The proceedings of the creditor, Moses May, appear to be regular in all respects. A decree in accounting proceedings was entered on June 17, 1881, directing the assignee to pay out of funds found to be in his hands specific sums to Moses May as a creditor of the assignors.

The assignment acts provide that the decree shall be entered, docketed and enforced the same as if made in an original action brought in the county court (*Laws of 1877, chap. 466, sec. 22, amended by Laws of 1878, chap. 318, sec. 6*). The creditor did cause judgment to be entered and docketed in his favor against the assignee upon the basis of the decree, on December 21, 1881, and issued execution upon such judgment. This was the only way to enforce a judgment of the county court, and therefore the only way to enforce this decree (*Matter of Stockbridge, special term, common pleas, 1879*). After return of his execution unsatisfied, the judgment creditor was entitled to

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institute supplementary proceedings. The provision of the Code (*sec.* 2458) prescribing that such proceedings can only be had upon a judgment rendered upon the judgment debtor's appearance or personal service of the summons upon him, does not confine the remedy to judgments entered in actions only. The provision was only intended to exclude judgments *in rem*. There was an appearance of the judgment debtor in these proceedings, for he applied for the citation for a general accounting. The judgment was one, therefore, rendered upon the judgment debtor's personal appearance, and the judgment creditor was entitled to maintain the proceedings (*Code, secs.* 2435, 2458).

Upon the return of the order for the examination of the judgment debtor he could not object that the judgment was irregularly entered, or that it was improper or invalid for any reason. His remedy was by motion to correct it or to vacate it (*Gardner agt. Lay, 2 Daly, 113*). It appears from the case before us that respondent made a motion to set aside the execution, but no decision was made on that motion because the proceedings upon the reference ordered to take proof of the facts was abandoned and dismissed by consent.

It appears, therefore, that the proceedings of the creditor are regular in all respects. The decree in his favor entered on June 17, 1881, was so entered upon the application of the assignee's attorneys. On the record, therefore, it seems that the composition and payment of May 5, 1881, was not in lieu of the dividend awarded the creditors by said decree. Besides, the decree ordered a dividend of ten per cent, to be paid out of the funds in the assignee's hands, while the composition was for twenty-five per cent, fifteen in cash and ten in notes, and the fifteen per cent was paid.

But whatever the fact may be, whether the judgment was entered by mistake, or was irregular, or the dividend provided in it was paid before it was entered, such matters cannot be heard upon the return of the order for examination in supplementary proceedings.

Almy et al. agt. Thurber et al.

The objection that the judgment cannot be enforced against Jung personally, and that the execution was improperly issued against his property, cannot properly be heard in this proceeding. The objection may be ground for moving to correct the judgment or to set aside the execution.

As the question may arise in these proceedings, however, as to the right of the creditor to examine the judgment debtor as to his individual property, and to have it applied to the payment of the judgment, it is proper to decide that question. The decree ordered the assignee to pay the creditors the sums awarded to them out of the balance of \$14,000.63 remaining in his hands. Upon the sheriff attempting to collect the sum awarded to May upon his execution, no money or property was found. If the assignee had appropriated the funds in his hands to his own purposes subsequently to the judgment, he must make it good to the creditors out of his own property. It will not be sufficient for him to answer that he has no funds of the estate after he has been adjudged to have funds for the distribution decreed. The judgment is not entered against him for a debt due from the assignors, but for his own debt, and his own property can be reached in this proceeding.

The order appealed from should be reversed, with ten dollars costs and the disbursements of the appeal.

N. Y. COMMON PLEAS.

HARVEY S. ALMY *et al.* agt. HORACE K. THURBER *et al.*

Attachment — Certificate under — Effect of — Estoppel — Doctrine of, applies only to voluntary representations, declarations, admissions and acts — Code of Civil Procedure, secs. 650, 651, 655, 677.

Where an attachment against a non-resident debtor is served upon a third party, who, upon demand, gives a certificate as to property or moneys in his hands belonging to the debtor, such third party is not estopped from showing, in an action brought against him on the faith of such statement, that he was honestly mistaken in making it.

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The doctrine of estoppel applies only to voluntary representations, declarations, admissions and acts, and has not been extended to declarations exacted by statute.

General Term, March, 1883.

APPEAL by plaintiffs from an order of this court, entered upon a verdict in their favor for \$120.95, with costs, and from an order denying plaintiffs' motion for a new trial. The action was brought by Almy & Co., joined with Bowe, sheriff of the city and county of New York, as plaintiffs, pursuant to section 677 of the Code of Civil Procedure, to recover from H. K. & F. B. Thurber & Co., property in their possession attached by the sheriff in an action by his co-plaintiffs against John Gourard & Co., of Curacoa. The attachment against the latter, as non-residents, was served upon the said defendants Thurber & Co., on May 10, 1881, and a certificate as to property or moneys in their hands belonging to the debtors, J. Gourard & Co., was demanded from them pursuant to section 650 of the Code. On May 28, 1881, they delivered to the sheriff the following statement:

NEW YORK, *May* 28, 1881.

MESSRS. JOHN GOURARD & Co., Curacoa, to H. K. & F. B. THURBER & Co., Dr., importers and wholesale grocers, West Broadway, Read and Hudson streets, P. O. box 3895:

Cr., April 16, by cash.....	\$2,003 63
Dr., May 10, to cash.....	\$0 20
Dr., May 13, to indse.....	1,882 48
	1,882 68
	\$120 95

(Signed) H. K. & F. B. THURBER & CO.

This action was brought to recover \$2,003.63, as the cash certified to be on hand to the credit of the debtors, John Gourard & Co., on May 10, 1881, when the attachment was levied. It was shown on the trial that on May 10, 1881, there

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was but \$120.95 in the hands of defendants Thurber & Co. to the credit of the debtors J. Gourard & Co., the merchandise charged at \$1,882.48, having been sold and delivered to the debtors by defendants, sometime prior to that date. The plaintiffs claimed that defendants were estopped from showing those facts by their statement delivered to the sheriff in which the merchandise was charged on May 13, 1881, because, on receipt of such statement, the sheriff relying thereon, made no further effort to find property subject to the attachment. The defendants contended that the statement alleged a balance of \$120.95, only to be subject to the attachment. The court left it to the jury to say if the certificate was given for the purpose of certifying they had \$120.95 in their hands at the time of the levy. The jury found for the plaintiffs \$120.95, and plaintiffs appealed.

J. F. DALY, *J.* — It was shown by evidence that there was an error in the statement delivered to the sheriff by defendants, by which it appeared that the charge for merchandise in their favor against the defendants in the attachment accrued after the levy; whereas, in fact, such charge accrued long prior to the levy, and that at the date of levy, May 10, 1881, there was but \$120.95 due John Gourard & Co., the defendants in the attachment, from these defendants. Defendants were not estopped from showing such error in an action brought on the faith of their statement. The certificate required of a person who has property of the attachment debtor, or is indebted to him by section 650, is evidently intended as the basis of an action under sections 655 and 677 against such person by the sheriff or the plaintiff in the attachment. By section 651 it is provided that if such person refuses to give the certificate, or gives a false or insufficient certificate, he may be required to submit to an examination under oath concerning the same. A certificate voluntarily given is of no higher character than a statement under oath made upon such an examination, yet it would not be claimed

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that a person so examined, if mistaken in his testimony could not correct it or show the truth when subsequently sued upon it. The object of the certificate or examination is apparent from the statute; it is to be used as evidence only; and the sheriff and plaintiff are not justified in using it for any other purpose, *e. g.*, as a representation of fact upon which they may rely in omitting to secure the demand in suit. The certificate or examination will be *prima facie* evidence against the party giving it in an action by the sheriff or the attaching creditor, but is no more conclusive than is an examination of a party in anticipation of an action under section 870 of the Code. The doctrine of estoppel applies only to voluntary representations, declarations, admissions and acts, and has not been extended, so far as I can discover, to declarations exacted by statute. A party certifying or testifying under stress of the law has not the option of speaking or holding his tongue; he is required to give testimony, and is to be indulged, therefore, as any other witness, and allowed to correct honest mistakes in his testimony when confronted with it.

The judgment should be affirmed, with costs.

SUPREME COURT.

THE NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY
agt. IRA DAVENPORT, Comptroller of the State of New York,
and FRANKLIN E. WORCESTER.

Cloud upon title — Action to remove — Sufficiency of complaint — Demurrer.

When property has been sold for the non-payment of an assessment and a certificate given, which, if followed by deed, will confer a *prima facie* title, the owner can maintain an action to set aside the sale and enjoin the deed for the illegality of the assessment, because in such a case there is a cloud upon his title, which evidence alone will remove.

The deed when given will be conclusive evidence of the regularity of the sale, and presumptive evidence that all previous proceedings were regular.

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This action affects the title to real estate of the subject-matter of which this court has jurisdiction; this court can by action remove a cloud upon title, when extrinsic evidence must be resorted to, and it follows that the statute, which gives to the comptroller power to cancel such sales, and which the complaint expressly avers he does not intend to exercise, but that, on the contrary, "*he intends to execute such deed,*" cannot possibly deprive this court of its well established jurisdiction.

A complaint which seeks to remove a cloud upon title to real estate, which not only avers the giving of a certificate of sale by the comptroller, but also contains the express averment that the comptroller intends to execute such deed is good on demurrer.

Albany Circuit, February, 1883.

DEMURRER to complaint.

James A. Dennison, deputy attorney-general, for defendants.

S. M. Coon, for plaintiff.

WESTBROOK, J. — The complaint in this cause seeks to remove an alleged cloud upon the title of real estate belonging to the plaintiff, arising upon the following facts: The lands have been sold by the comptroller of the state for non-payment of taxes levied upon them in the city of Oswego, and in several towns in which they are situated, and a certificate of sale thereof has been given to one Charles Rhodes, who has assigned such certificate to the defendant Franklin E. Worcester who is the present owner and holder thereof. The sales were made in 1881, and the complaint charges and avers: "That the said Worcester will be entitled to a deed of all the said property so sold upon the expiration of the said two years, that the same has not been redeemed, and the said comptroller Davenport, unless restrained by law, will be compelled to, and intends to, execute such deed or deeds to said defendant Worcester or his assigns. That the said deed or deeds will be a cloud upon the title of the real estate so sold, and will convey a title in fee simple to said property." For various causes and reasons, which are detailed in the complaint, the plaintiff claims that the taxes and assessments, for

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the non-payment of which the sales were made, are void, and as a relief it asks that the same shall, by judgment of this court, be declared void, and the giving of the deed enjoined.

To this complaint the defendant Davenport has demurred. Upon the argument of the demurrer, it was not claimed that the taxes were legally imposed, but it was insisted that the complaint should be dismissed for two reasons: 1st. That the comptroller had power, at any time before the giving of the deed, to cancel the sales, and that therefore this action could not be maintained; and 2d. That the mere fact of selling the property and giving a certificate of sale was not sufficient evidence of danger to the title to justify the action.

The question will not be elaborately discussed, but conclusions stated, which overrule the demurrer.

First. When property has been sold for the non-payment of an assessment and a certificate given, which if followed by deed will confer a *prima facie* title, the owner can maintain an action to set aside the sale and enjoins the deed for the illegality of the assessment, because in such a case there is a cloud upon his title which evidence alone will remove (*Scott agt. Onderdonk and another*, 14 *N. Y.*, 9; *Dederer agt. Voorhies*, 81 *N. Y.*, 153; *Strasburgh agt. Mayor, &c.*, 87 *N. Y.*, 452, 455).

Second. The deed, when given will be conclusive evidence of the regularity of the sale and presumptive evidence that all previous proceedings were regular.

Third. This action affects the title to real estate of the subject matter of which this court has jurisdiction; and it having been repeatedly held that this court can, by action, remove a cloud upon title when extrinsic evidence must be resorted to, it follows that the statute which gives to the comptroller power to cancel such sales and which the complaint expressly avers he does not intend to exercise, but that, on the contrary, he "*intends to execute such deed*," cannot possibly deprive this court of its well established jurisdiction.

Fourth. The complaint in this case not only avers the giving

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of a certificate of sale by the comptroller, which, according to *Scott* agt. *Onderdonk* (14 *N. Y.*, 9 ; see page 16), is sufficient evidence of the intent to complete the attempted transfer of title by conveyance, but it also contains the express averment that the comptroller "intends to execute such deed." This averment the demurrer admits. This fact takes the case out of and from the effect of the decision of the court of appeals in *Sanders* agt. *Village of Yonkers* (63 *N. Y.*, 469), and from that of the general term of this department in *Clark* agt. *Davenport*. The plaintiff does not rely for the maintenance of its action only upon the averment that a certificate of sale has been given, as evidence of an intent by the comptroller to execute a deed, but it also alleges the actual intent so to do as a fact, and this brings the case within the principle laid down by the court of appeals in *Sanders* agt. *Village of Yonkers* (see page 492) that "it should appear that there was at least some imminent danger that a lease would be given, and that the interference of a court of equity was necessary to prevent a cloud upon title." If, on the trial of this action, it shall appear that the only evidence of the intention of the comptroller to execute the deed is the fact that he has given a certificate of sale, it will be then proper to apply the principle of the two cases referred to. On a demurrer, however, which for the purposes of its determination, is to be regarded as admitting an intention to consummate a sale by a conveyance, it cannot be judicially declared that there is no "imminent danger that a" deed will be given, and that therefore "the interference of a court of equity" is unnecessary "to prevent a cloud upon title."

Fifth. As the defendants did not, on the argument, discuss the validity of the assessment, their invalidity is assumed.

Sixth. The demurrer is overruled, with costs, the defendants having liberty to answer upon their payment.

Kehn agt. The State.

COURT OF APPEALS.

ANDREW KEHN agt. THE STATE OF NEW YORK.

Albany (city of) — Firemen in the capitol — Pay of — Statutory salary cannot be reduced except by law.

The provision in the general appropriation act of 1875 that "the compensation of the men employed as firemen in the capitol is hereby fixed at three dollars per day to each of them; said salaries shall be paid upon the certificate of the keeper of the capitol," is prospective and applies to firemen in the capitol employed subsequent to the year in which such appropriation act was passed.

The pay of a fireman to which this provision is applicable cannot be reduced except by law, as his case falls within the decision of this court in *People agt. Board of Police* (75 N. Y., 42).

In applying the principle that a statutory salary cannot be reduced except by law, it is immaterial whether the person whose salary is so fixed is or is not an officer so long as he is specified in the statute fixing his salary.

The acceptance of reduced pay for a portion of the time that services are rendered does not operate as an estoppel from afterwards recovering in an action the full rate prescribed by the statute.

October Term, 1883.

APPEAL from judgment of the general term of the supreme court of the third department, affirming a decision of the board of audit disallowing the claim of Andrew Kehn.

At general term BOARDMAN, J., delivered the following opinion in this and another case before it:

These are appeals from the awards of the board of audit, brought under chapter 211, Laws of 1881. The cases are alike in their facts and the principles which must control the decision.

There was a conflict of evidence before the board of audit. The state officers claim a hiring of the defendants as laborers for the time for which payment is now claimed at one dollar and fifty cents per day.

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The defendants claim three dollars per day by virtue of a law fixing the pay of fireman at that rate.

The evidence satisfactorily shows that the defendants were each hired and agreed to work for the price of one dollar and fifty cents per day. That rate should therefore control, unless the law fixing firemen's pay at three dollars is conclusive upon us. We do not think it is, for two reasons:

First. That defendants were not employed as firemen, and it was so understood by the parties.

Second. That if wrong in the first reason assigned, the rate fixed by the statute may be modified and reduced by the contract and agreement of the parties, the board of audit properly held that the defendants were entitled to one dollar and fifty cents per day only. But the claim of each defendant, as we understand the facts, embraced a sum of money actually due the defendants in accordance with the decisions of the board of audit, at one dollar and fifty cents per day. The decisions of the board therefore dismissing the respective claims of plaintiff is open to be misconstrued, as insisted upon, as a bar to any further claim by either plaintiff for such acknowledged balance due. To obviate any possible wrong in this respect we think the award should be affirmed in such case, but neither such award nor this affirmance shall bar or prevent the several plaintiffs from demanding and receiving from the State the balance still unpaid them, respectively, at and after the rate of one dollar and fifty cents per day, and now conceded to be still due them. No costs of this appeal allowed. Order to be settled by BOARDMAN, J., if not agreed upon by the attorneys.

The facts are sufficiently stated in the opinion of RAPPALO, J.

Edward J. Meegan, for appellant:

I. The statute fixed the pay of firemen employed in the capitol at three dollars per day as their salaries (*Laws of 1875*, p. 801). (a) The provision of the statute is as follows: "For the capitol, for expenses, for repairs, and deficiency in

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appropriation for cleaning, labor, gas and other necessary expenses, the sum of \$16,000, and the compensation of the women employed in cleaning the chambers and rooms adjoining the senate and assembly chambers is hereby fixed at two dollars per day to each of them; and the compensation of the men employed as firemen in the capitol, is hereby fixed at three dollars per day to each of them. Said salaries shall be paid upon the certificate of the keeper of the capitol." This statute prescribed an imperative rule of action for the guidance of the disbursing agent of the state. A salary was in express terms fixed and definitely established and upon the performance of duty as a fireman the salary attached as a result and an incident; the employment was indelibly stamped with the legislative impression of the value of the services to the state and which it was willing to pay. If it had been intended to confer upon any official power or discretion to vary this declared and adjudged salary and to reduce it, the law-making power could easily have so provided. Because this provision is contained in the appropriation bill does not affect it. It was competent for the legislature to make use of this general law through which to formulate its wishes in this regard; this provision was germane to the general subject of the act. It is well known that provisions establishing permanent rules are frequently incorporated in this bill, as the authority to create additional deputy attorneys-general (*Laws* of 1800, p. 251), and also various provisions with reference to the new capitol, &c. Our claim is that it was intended by this section to prescribe a rule to guide official action in the future, otherwise the mere appropriation would have sufficed with words adjusting the salaries for the year 1875. Unless, it is submitted, the words of a statute command such a construction, it is to have effect and operation for the future. "It is a first principle in legislation that all laws are to operate prospectively" (*Jackson agt. Van Zandt*, 12 *Johns.*, 176). This act of 1875, in its allusion to the capitol, referred to what is now called the old capitol building.

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The Revised Statutes make this proposition plain and clear, it enacts: "Sec. 1. The buildings in the city of Albany now known as the capitol and state hall shall continue to be known and denominated by those names" (1 *R. S.* [7th ed.], 581). Both statutes being *in pari materia* are to be construed together, and to ascertain the legislative intent it would be appropriate in reading the act of 1875 to add after the words "firemen of the capitol," the definition of that word as given in the Revised Statutes, to wit: "The building in the city of Albany now known as the capitol shall continue to be so known and designated." And it is to be noted that this section of the Revised Statutes has not been repealed. It is a fair and reasonable assumption that the legislature intended the building now called the "old capitol," and not a migratory name which in the future might be applied to any other building. The old capitol building continued to be used under the same management and by the same officers after January 1, 1879 (the date fixed by the joint resolution of May 14, 1878, Laws of 1878, p. 519, when the new capitol building is declared to be the capitol of the state of New York), for the purposes of the state government, state officers, including the governor, and the court of appeals performing their official functions therein; and the necessity for the services of firemen continued as well after as before the senate and assembly took their abode in the new structure, and full provision was in each year specifically made for the care of the new capitol building. Again, the Revised Statutes provide for trustees of the capitol, committing its care and custody to them (1 *R. S.* [7th ed.], 582; *Laws of 1830, chap. 249*). And by chapter 325 of the Laws of 1881, those trustees of the capitol are not to assume control of the new capitol until the first day of January following the demolition of the old capitol. The addition of the adjectives "new" or "old" does not change the effect of the noun "capitol" as the new building was in course of construction when the act of 1875 in question went into operation; and as the new building was and is under an

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entirely different system of management, the old management and regulations with reference to the old building should be held to be in force as to that building. The appropriations for the old capitol during the years 1879, 1880 and 1881, are made under the title or caption of "capitol" (*Laws of 1879*, p. 214; 1 *Laws of 1880*, p. 254; *Laws of 1881*, p. 276). No significance should be ascribed to the fact that in 1880 and 1881 the salary of the superintendent was fixed in the appropriation bill at \$1,200 per annum; because prior to that time the same course was adopted (*Laws of 1878*, p. 33). It is important to note that, as to the women employed, the act of 1875 in question carefully restrict their employment to the cleaning of the chambers and rooms adjoining, of the senate and assembly, while as to the men employed as firemen, there is no restriction whatever. They are not employed to make fires to heat rooms occupied by the senate and assembly.

II. The appellant was duly appointed one of the firemen of the capitol, he was therefore entitled to the salary, three dollars per day, as fixed by the statute, and the attempt to reduce it during the summer months to one dollar and fifty cents per day was illegal and ineffectual. (a) This court has established the rule that the salary of an officer, as fixed by statute, cannot be reduced except by law duly enacted. The salary attaches to the position (*The People ex rel. Satterlee agt. Board of Police*, 75 N. Y., 42; *The People ex rel. Ryan agt. French*, 13 Reporter, 599). In the *People ex rel. Ryan agt. French* (*supra*) it was held that the police commissioners of New York city have no power to reduce the salary of an officer who is unable to do duty because of injuries received in the performance of his duty. In the late case of the *People ex rel. Nugent agt. Board of Police* (27 Hun, 261) a policeman was placed under arrest by his superior officer for burglary, and remained in prison some time, when he was tried and acquitted, it was held that he was entitled to his salary during the time he was in prison. The rule is the same in Virginia. In *Montague's Administrator agt. Massey* (13 Rep.,

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700) the supreme court of appeals held that where the legislature attempts by a legislative enactment to reduce the salary of a judge, and the act is subsequently declared to be unconstitutional, the acceptance of the reduced salary by the judge without protest or objection, during the period of the life of the enactment is not a waiver of his right to the entire salary, nor is he estopped from claiming it. The reasons of the rule are explained by MILLER, J., in 75 *New York*, 42: "As the statute gave the salary, I think fixing the amount at a less rate by resolution could not make it less than the statute declared. There is no principle upon which an individual appointed or elected to an official position can be compelled to take less than the salary fixed by law. The acceptance and discharge of the duties of the office, after appointment, is not a waiver of a statutory provision fixing the salary thereof, and does not establish a binding contract to perform the duties of the office for the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such officials can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent." Judge CHRISTIAN (13 *Reporter, supra*, 701) thus explains the rule: "Certainly the receipt or acceptance of a part of a debt is not a satisfaction of the whole, and such receipt or acceptance of a part cannot be held as a waiver of the right to recover the balance. See the leading case of *Cumber agt. Wane* (1 *Smith L. C.*, 595, and cases there cited), containing a most exhaustive discussion of the whole subject which makes it unnecessary to refer to any other authorities. These principles, settled with reference to transactions between man and man, apply, I think *a multo fortiori*, to transactions between a state and one of its citizens." "When an act of congress declares that an officer of the government, or public agent, shall receive a certain compensation for his services, which is specified in the law, that com-

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pensation can neither be enlarged nor diminished by a regulation or order of the president, or of a department, unless the power to do so is given by act of congress" (*Goldsborough agt. United States, Taney's C. C. Dec.*, 80). In this case it was insisted that the purser (claimant) did not come within the description of an officer, to which TANER, Ch. J., replied: "It would be a sufficient answer to say that the compensation of the purser is undoubtedly specified in the law, and he is therefore within the general principle before stated" (*Id.*, 89). There is no difference in principle between the foregoing cases and the one at bar. In all the cases public services were required and a salary was prescribed, and whether the appellant was or not a technical officer should make no difference. The statute is mandatory. He was to receive a salary of three dollars per day, and as long as he was retained in the place he should receive it. The services to be rendered by him were the same in all seasons, summer and winter. The reasons given as to policemen apply with equal force to the position of the appellant. It is significant that the statute employs the word "salary" not "wages." But the rule which prevails between master and servant is equally effective for the appellant. It is well stated, as follows: "Section 106. Wages cannot be reduced during the term. Where by the terms of a contract for a year's service, or any other definite period, the compensation is fixed at a certain price per month, or for the term, the employer cannot reduce the price to be paid by a notice to the servant that he cannot pay him more than a certain sum after a certain time. In order to reduce the contract price, the consent of the servant to such reduction must be clearly shown, and the fact that he remained in the master's service after notice that a reduction would be made is not evidence from which such consent can be implied. He not only had a right, but was bound to remain until his term was completed, unless the master discharged him, or he elected to leave because of a legal excuse furnished by the master" (*Wood's Master and*

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Servant, p. 205). This case is totally unlike the recent case of *O'Brien agt. The Mayor* (29 Hun, 250). In that case the plaintiff had been appointed an engineer at \$1,500 per annum; he afterwards consented to serve in a different capacity, that is, as a machinist at less pay, and it was held he could not recover the difference in salaries. In *Drew agt. Mayor* (8 Hun, 445), judge BRADY dissented and judge DANIELS concurred with judge DAVIS on this ground: "If he (the plaintiff) made no agreement to receive sixty dollars per month, he should have offered proof of that fact."

III. There is no foundation for a claim that the appellant ever agreed or consented to the reduction of his salary one-half. It clearly appears that there was a perfect contract or employment as fireman with the appellant to take effect May 1, 1880. Upon this the minds of the parties met. The notice of reduction was never assented to by the appellant; he always claimed the full salary. Can this notice be called a contract? He was appointed as a fireman but once. There is no pretense that he was rehired after September 30, 1880, as such, yet his services thereafter are continued and recognized at the full salary. The appellant entered the service of the state May 1, 1880, and until the twenty-third of that month was paid three dollars per day; after that for the next five months he received pay at the rate of one dollar and fifty cents per day; for the next ensuing eight months and until May 21, 1881, he was again paid three dollars per day; for about one month afterwards the pay was at the rate of one dollar and fifty cents per day; and from June 30, 1881, to the time of filing the claim, which included the summer months of 1881, he received no pay; in other words, he performed the same kind of services for twenty months, six months of which time under a duress of poverty he received half his salary only. The notice to the appellant, after the employment was complete, as to the contemplated deduction, and his acceptance, under objection for a small portion of the time, of the reduced salary are not sufficient to constitute an agreement. It was his duty to per-

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form the services. It is an important fact that, although during the summer of 1881, the state accepted the services of the appellant, he refused to take pay unless the full salary was paid. This statute authorized the employment of firemen, the general duties of whom are well known; it would be strange, then, if one member of a board of officers possessed the power of employing laborers instead of firemen to do the work of firemen. Express authority being conferred to do an act in a certain way, no implied power exists to perform it in another way. It was, therefore, out of the power of Hyde, representing the comptroller alone of the board of trustees, to make any contract to reduce the salary of the firemen.

D. B. Keeler, deputy attorney-general, for respondent:

I. The appellant was entitled to receive but one dollar and fifty cents per day for his work during the summer months, and his agreement with the superintendent to that effect was binding upon him. (a.) The clause in the statute of 1875 did not apply to his hiring; that statute contained provisions for the care and maintenance of the capitol for the year 1875; so far as it relates to the firemen its language is in the present tense. It in no way related to the future. Besides, in the years 1880 and 1881 the building in which the claimant was employed was not the capitol (*Laws* 1878, p. 519). (b.) The contract which the appellant made was binding upon him (*Phyfe* agt. *Eisner*, 49 *N. Y.*, 102; *Drew* agt. *Mayor*, 8 *Hun*, 445),

II. The appellant was not an officer but only a laborer; he took no oath of office, no trust was confided to him, no discretion to manage was given to him, no term for his employment was fixed by law or otherwise; he was subject to the direction of the trustees and was to be discharged at will (*Sullivan* agt. *Mayor*, 47 *How. Pr.*, 493). (a.) In *Satterly* agt. *Mayor* (75 *N. Y.*, 38) the plaintiff was a police surgeon, an officer, who took an oath of office and his salary was fixed by the year, which clearly distinguishes it from this case.

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RAPPALO, *J.* — The uncontroverted evidence shows that on the 1st of May, 1880, the appellant was employed by Mr. Hyde, superintendent of the old capitol, as fireman therein, and continued to serve in that capacity from the time of his employment until the filing of his claim before the board of audit, which was in November or December, 1881.

He claims pay at the rate of three dollars per day during that period, by virtue of a provision in the general appropriation act of 1875, which reads as follows: "And the compensation of the men employed as firemen in the capitol is hereby fixed at three dollars per day to each of them; said salaries shall be paid upon the certificate of the keeper of the capitol."

The appellant was paid at the rate thus prescribed by law, from the time of his employment up to the 24th of May, 1880, when the superintendent, claiming to act under the direction of the comptroller, refused to allow him more than one dollar and fifty cents per day during the summer months, and he made this reduction for the periods from May 24, 1880, to September 30, 1880; from May 21, 1881, to June 30, 1881.

The appellant received the reduced pay during these periods, but there is no evidence that he ever agreed to the reduction. From June 30, 1881, to September 30, 1881, he declined to receive the reduced pay, and has been paid nothing.

The present claim is for the sum necessary to make up his full pay of three dollars per day up to September 30, 1881. The board of audit rejected the claim, and on appeal to the supreme court, the general term sustained the decision on two grounds. First, that the appellant was hired and agreed to work for one dollar and fifty cents per day, and was not employed as fireman. Second, that, if otherwise, the rate fixed by statute for fireman's pay might be modified and reduced by the agreement of the parties.

The first ground is, we think, wholly untenable under the evidence. The testimony is positive and uncontroverted that the appellant was employed as fireman, and not in any other capacity. The superintendent himself testified that he had

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employed the appellant as one of the firemen on the 1st of May, 1880 ; that he did not discharge him as fireman, and did not hire him over as laborer ; that fires were made during the summer months for the purpose of drying out the dampness ; that these men (appellant and another) made the fires ; that it was their duty to make them, and that they were on duty ready to make them. He does not allege that they ever agreed to a reduction in their pay, but testified that he used his own discretion as to the time when their wages should be reduced.

As to the second ground upon which the general term placed their decision, we think it comes within the decision of this court, in *People ex rel. Satterlee agt. Board of Police* (75 N. Y., 42), where it was held that the board of police commissioners could not reduce the amount fixed by law as the salary of a police surgeon, and procure persons to act at a less sum than the statute prescribed. To the same effect is *Goldsborough agt. United States* (Taney's C. C. Decisions, 80). In that case it was further held that it was immaterial whether the person whose salary is fixed by law, is or is not an officer, so long as he is specified in the law fixing his salary. The present case, however, is stronger than either of those cited. At the time the appellant entered into the service his pay was fixed by law, and there is no evidence that he ever consented to a change. It was reduced by the superintendent, and for a portion of the time the appellant took the reduced pay, but that does not estop him from claiming his full pay if he was legally entitled to it (*Montague agt. Massey*, 13 Reporter, 701).

On the present appeal the attorney-general raises the point that the statute of 1875 fixing the rate of appellant's pay did not apply to the firemen employed in the old capitol building in 1880 and 1881, a ground not taken by the general term.

At the time of the passage of the act of 1875 the old capitol building was the only one known as the capitol. This name was declared by law and was to continue. The trustees of the capitol had its care and custody (*Laws of 1830, chap. 249*),

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and are not to assume control of the new capitol until the first of January following the demolition of the old capitol (*Laws of 1881, chap. 325, sec. 4*).

The provision fixing the salaries of the firemen employed in the capitol had reference to the old capitol, and had not, in 1881, been repealed. It was clearly prospective and not confined to the firemen in the service in 1875.

We think the appellant was entitled to a salary of three dollars per day so long as he was retained as fireman, and that his claim should have been allowed.

The judgments of the general term and of the board of audit should, therefore, be reversed and judgment rendered in favor of the appellant for the amount of his claim, with costs.

All concur, except EARL, J., not acting. *

CITY COURT N. Y.

CHESTER S. COLE, captain of the port, plaintiff and respondent,
agt. MICHAEL MAHONEY, defendant and appellant.

Judgment — Repeal of statute after recovery of — Powers of the harbor master.

Under section 7 of the act of 1862 (*chap. 487*) the harbor master acts *quasi* judicially and has the power to decide whether a vessel is in good faith engaged in discharging its cargo, and whether circumstances require that it should be assigned to another berth.

The subsequent repeal of a statute does not impair the binding force or validity of a judgment recovered prior to such repeal.

General Term, October, 1883.

APPEAL from judgment entered on verdict.

BY THE COURT. — We think that under section 7 of the act of 1862 (*chap. 487*) the harbor master acts *quasi* judicially and has the power to decide whether a vessel is in good faith engaged in discharging its cargo, and whether circumstances

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require that it should be assigned to another berth. The reasons for this conclusion are stated in *Cole agt. Kelly* (1 *City Ct. R.*, 400). The verdict herein was recovered February 21, 1883, and judgment was entered February 26, 1883. The subsequent repeal of this statute does not impair the binding force or validity of the judgment herein recovered prior to such repeal. The cases cited by the appellant on this branch of the case refer to criminal convictions for penalties, and one refers to an admiralty proceeding. They do not affect a judgment recovered in an ordinary civil action. These cases were considered by the court of appeals in *Hartung agt. The People* (22 *N. Y.*, 95); but the court in that case while declaring the rule contended for by the appellant to be applicable to criminal prosecutions, and therefore conclusive as to the conviction then under review, were careful to limit the rule to such cases, and to exempt from its operation appeals in actions under the Code of Civil Procedure. This is the plain import of the language of DENIO, J., who delivered the opinion of the court in that case, in which (*on page 108*) he said: "Generally the question in a court of review is whether the judgment of the subordinate tribunal was erroneous when pronounced upon the law as it then stood. This is so upon appeals arising under the Code," &c.

We have examined the various exceptions taken during the trial and the other points made upon the argument, but we have failed to discover any error which requires a new trial. It follows, therefore, that the judgment must be affirmed, with costs.

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SUPREME COURT.

HENRY WALLACH and another, respondent, agt. ISAAC SIPPILLI.

Attachment — Sufficiency of affidavit for.

Though there may be an abundant recapitulation of facts and circumstances in an affidavit, asserted on information and belief, to show that defendant had assigned and disposed of his property with intent to defraud his creditors, yet to permit the issuing of an attachment, the information must be authenticated by the person from whom it had been obtained.

An affidavit showing that the person making it had called at the residence of the defendant and endeavored to secure an interview with him, which was refused under the asserted authority of the defendant, is not sufficient for the allowance of an attachment on the ground that defendant kept himself concealed to avoid the service of a summons.

First Department, General Term, June, 1883

APPEAL from an order denying a motion to vacate an attachment.

Blumensteil & Hirsch, for appellants.

Leopold Wallach, for respondents.

DANIELS, J.—The attachment was allowed upon the ground that the defendant kept himself concealed to avoid the service of a summons, and had assigned and disposed of his property with intent to defraud his creditors.

The latter of these charges was based upon an abundant recapitulation of circumstances tending to show its existence. But the difficulty in the case is that they were all asserted upon information and belief, and that information was in no manner authenticated by the persons from whom it had been obtained. For that reason this portion of the application was not sustained as the law requires it to be to permit the issuing of an attachment (3 *Greenleaf on Ev.* [8th ed.], sec. 384; *Steuben Co. Bank agt. Alberger*, 78 N. Y., 252).

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To sustain the other ground the affidavit merely shows that the person making it had called at the residence of the defendant and endeavored to secure an interview with him, which was refused by the attendant at the door under the asserted authority of the defendant, and that certainly failed to establish the alleged fact that he was concealing himself at his residence to avoid the service of the summons.

The affidavit was radically insufficient to support the application for the attachment, and the order should be reversed, with the usual costs and disbursements, and an order entered vacating the attachment.

DAVIS, P. J., and BRADY, J., concurs.

N. Y. SUPERIOR COURT.

AMANDA A. BROADWELL agt. WILLIAM F. HOLCOMB.

Summary proceedings—When execution of the warrant for dispossession of a tenant may be stayed—Code of Civil Procedure, sections 2262, 2263, 2265.

The execution of the warrant in summary proceedings for dispossession of a tenant will not be stayed when the plaintiff has a remedy at law. The remedy by injunction is confined to cases and conditions in which it might be granted to stay the execution of a judgment in an action of ejectment.

At Chambers, August, 1883.

MOTION for injunction to stay execution of warrant in summary proceedings by a landlord against his tenant.

Pierre C. Talman, for motion.

John F. Baker, opposed.

VAN VORST, J.—The Code of Civil Procedure gives an ample remedy for the review of the proceedings upon a summary application by a landlord for the removal of his tenant for

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non-payment of rent. Formerly by *certiorari*, it is now by appeal (Sec. 2260).

And section 2261 declares that the issuing of the warrant cannot be stayed by such appeal or the giving of an undertaking thereunder, otherwise than is provided for in section 2262. In the county of New York, however, the execution of the warrant will not be stayed by the appeal on the proceedings thereunder (Sec. 2262).

Section 2263 gives to the person dispossessed a remedy by action for the recovery of the damages which he may have sustained by the dispossession, if the final order is reversed upon the appeal.

Section 2265 provides that, if the final order awards delivery of the possession, the issuing or execution of the warrant therefor cannot be stayed or suspended by any court or judge except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal in a case, and in the manner specially provided for that purpose.

2. By an injunction order granted in an action against the petitioner (*i. e.*, the landlord) * * * "after the final judgment, except in a case where an injunction would be granted to stay the execution of the final judgment" in an action of ejectment, and upon like terms.

We have here a full scheme, with specific regulations, controlling these summary proceedings, and which gives the only method of a review of the same, and it limits the cases and conditions upon which an order of injunction may be granted to stay the execution of the warrant after final judgment. This latter remedy is confined to cases and conditions in which an injunction might be granted to stay the execution of a judgment in an action of ejectment. In order, therefore, to determine the plaintiff's right to a remedy by injunction, we must consider in what cases, and for what reasons, it might be invoked to stay the execution of a judgment in ejectment.

In *Chadwick agt. Sprague* (1 *N. Y. Civil Procedure R.*,

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422) we have it stated: "The proceedings of the plaintiff in an action of ejectment will not be enjoined when the questions involved can be determined at law, or when the ground relied upon for an injunction would be equally available if urged as a defense to the action. If the questions raised by the answer in the proceeding are within the jurisdiction of the justice to decide, the question of the correctness of his ruling must be raised by appeal (*Jessuram agt. Mackie*, 24 *Hun*, 624, 627).

In *Knox agt. McDonald* (25 *Hun*, 268), HARDEN, J., in an opinion at general term, says, in substance, that injunctions are granted after final judgment in ejectment when the plaintiff is making an oppressive use of it, citing *Jackson agt. Styles* (3 *Wend.*, 49), or when the plaintiff's title to the premises has terminated, or where the defendant has, subsequent thereto, acquired some interest or equity in the subject matter which should be protected, or when the judgment was procured by fraud or collusion (*See, also, Armstrong agt. Cumming*, 20 *How.*, 313; *Brown agt. Met. Gas. L. Co.*, 38 *How. P. R.*, 133).

In *Chadwick agt. Sprague* (*supra*) it was said, "that if the justice goes beyond his jurisdiction, either in taking cognizance of the proceeding or while he is acting in it, this court might doubtless restrain; so it might, I think, if it appeared that the tenant had equities which the justice could not protect."

These cases, I think, sufficiently indicate the cases in which this court can under its equity powers restrain the execution of the warrant, and I cannot conceive it to be necessary to add anything to the exposition of the law thus made. They indicate the rule which should apply to and would be likely to be decisive of any given case.

The question arises, does the plaintiff make out a case which would authorize the court to interfere with the execution of the warrant which has been ordered to be issued by the justice before whom the proceedings were had?

It was urged on the argument of this motion, on the plaintiff's behalf, that the relation of landlord and tenant was

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created by the writing of May 1, 1883, which forms a part of the papers in the case, and by which the payment of the rent was attempted to be secured. But I do not so understand the transaction. The agreement for the letting of the premises and for the amount of rent to be paid therefor, and when to be paid, was fixed before that day and about the middle of April, 1883, plaintiff agreeing to give security for the payment of the rent. The security given on the first day of May was in pursuance of such previous agreement and was not the original, but a collateral undertaking and obligation. The rent was to be paid monthly in advance.

I do not find in the writing of May 1, 1883, any waiver on the part of the landlord, either of the payment of the rent, monthly in advance, or of his right to invoke his remedies under the statute, in case of a failure to pay the rent when due. And a collateral security has this quality, that it does not necessarily suspend legal efforts and remedies to enforce the principal undertaking, according to its terms until it be fully satisfied, and when that is accomplished the security should be given up. In any event the questions raised before the justice were legal, and involved the determination of the time and terms of the letting of the premises, and as to rent being in arrear, and the effect of the agreement providing for collateral security, and as such were within the jurisdiction of justice to decide, and this court has no supervisory power over his judgment, or to review it, or supersede its execution, in a suit of the character of the one now under consideration.

If there is any error in the proceedings before the justice or in his decision, it can be corrected only on appeal, and if his decision should be ultimately reversed, the plaintiff's remedy under the Code is by an action for damages. It is thus seen that the plaintiff has a remedy at law, and in such case equity cannot interfere.

The motion for a continuance of the injunction must therefore be denied, and the temporary injunction must be dissolved, with ten dollars costs.

Malcolm agt. Hamill.

N. Y. SUPERIOR COURT.

JAMES F. MALCOLM agt. HENRY F. HAMILL.

Costs — Argument on appeal — Costs to be allowed to party for argument in court of appeals, where the case was submitted — Code of Civil Procedure, section 3251 — Meaning of word "argument" as used in this section.

The word "argument," as used in section 3251 of the Code of Civil Procedure, is not to be construed to mean oral argument alone, but to comprise within its meaning a submission of the reasoning, on which counsel relies, in a printed form as well as by spoken address.

On an appeal to the court of appeals the successful party is entitled to tax sixty dollars for argument, notwithstanding the case was submitted to the court by consent without oral argument.

Special Term, August, 1883.

MOTION for retaxation of respondent's costs on appeal to the court of appeals, on the ground that the item of sixty dollars for argument should not have been allowed, inasmuch as the case was submitted to the court by consent without oral argument.

O'GORMAN, J.— The motion papers do not state that printed points were delivered to the court, but from my recollection of the argument of counsel on this motion I assume that such was the case. The question, therefore, is whether the word "argument," as used in section 3251 of the Code, must be understood to mean oral argument alone. The language of some of the rules of the court of appeals, now in force, give some color to that view.

RULE 21. "When a case is called on the calendar, it must be either argued or submitted. If the appellant appears, he may either argue or submit the case."

The rules of the court of appeals, formerly in force, however, refer to printed arguments:

RULE 14. "Cases not exchanged may be submitted on printed arguments," &c. (*Voorhiss' Code*, 1877, p. 84^r).

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I see no reason to believe that the difference in phraseology in the more recently adopted rules is other than accidental. Counsel have not been able to furnish me with any authorities bearing on the question, and it must be decided according to the reason of the thing and the general understanding and practice in the profession. The intention of the Code (*sec.* 3251), is, no doubt, to provide for the compensation of the attorney for services rendered in the process of the action, and for the labor devoted by him therein. The careful preparation of the printed points for submission to an appellate court involves anxious consideration and the laborious research which forms the basis of every argument. On these printed points counsel often mainly relies as the means of keeping fresh in the memory of the court the reasoning on which he hopes to succeed. If, by the consent of counsel on both sides, the case is submitted on these printed points alone, it is with the intention that they may stand in place of oral argument, as being sufficient without it. If the court consent to receive the case and examine it with the aid of these printed points alone, and decide it, it can scarcely be said that the court has decided without argument. The growth of any practice in the profession which would deprive the court of the great benefit of lucid presentation of the case by "*viva voce*" argument of counsel, would be, I think, injurious both to the bench and the bar; and such practice should not be encouraged.

On the other hand I cannot say that the submission of a case on printed points alone may not be often a convenient and effective mode of argument, and entitled to as much compensation as if the argument had been spoken and heard, instead of being printed and read.

In my opinion the word "argument" in the section of the Code referred to comprises within its meaning a submission of the reasoning on which counsel relies in a printed form as well as by spoken address.

The motion to retax must, therefore, be denied, with ten dollars costs.

Pollock agt. Wannamaker.

N. Y. CITY COURT.

JAMES POLLOCK, plaintiff and respondent, agt. LEWIS C.
WANNAMAKER, defendant and appellant.

*New trial after dismissal of complaint — When may be had — Code of Civil
Procedure, section 999.*

Upon a trial by jury the trial judge may, in a proper case, award a new trial upon a dismissal of the complaint.

General Term, October, 1883.

APPEAL from an order granting a new trial.

Edward C. Graves, for defendant and appellant.

George W. Blunt, for plaintiff and respondent.

McADAM, J. — The trial judge discovered that he was in error in dismissing the plaintiff's complaint and entertained a motion for a new trial upon the minutes. The trial was had before a jury, and the application aforesaid was made during the term. The trial judge granted the application, and the defendant appeals from the order on the ground that the trial judge had no power to make it under the circumstances. We think he had, and that the language of section 999 of the Code of Civil Procedure is broad enough to comprehend such a case. That section authorizes the trial judge to set aside a verdict of the jury when contrary to the evidence or the law, and this whether the verdict was rendered by the mutual agreement of the jurors or by the direction of the trial judge. The evident design of that section was to allow the trial judge to correct whatever errors were committed during the trial of jury causes, by him or by the jury. If the trial judge had directed the jury to find a verdict for the defendant, it is conceded that he could lawfully have set it aside, but because he put this direction in the form of a

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dismissal of the complaint, it is contended that he has no such power, as the word *dismissal* does not appear in section 999 (*supra*). It is true that it does not appear there *eo nomine*, but it does appear by a proper legal interpretation of that section. The final disposition made by the court of the jury trial is to all practical intents a verdict, a term which literally means "a declaration of the truth." If a court directs a verdict it is in form the verdict of the jury, but in fact the verdict of the judge who directs it. If the trial judge may direct the verdict as to form and amount, what practical difference can there be, so far as this question is concerned, between a direction called a verdict and one called a dismissal? Either terminates the action, and either is subject to review on appeal, and why are they not reviewable in the same manner? The manifest object of this provision was to furnish a summary and inexpensive mode of correcting errors committed on a trial by jury without putting the aggrieved parties to the trouble, delay and expense of an appeal. The proper rule of construction in such a case is not to limit and circumscribe the power, but to add force and life to the remedy, according to the true intent and meaning of the makers of the act, *pro bono publico* (*Potter's Dwarries Statutes*, 184).

Under section 264 of the former Code (which is similar to section 999 of the new) judge BARRERT held that upon a trial by a jury the trial judge may award a new trial after a dismissal of the complaint (2 *Abb. N. C.*, 295). We concur in his reasoning and conclusions. In *Van Doren agt. Horton* (19 *Hun*, 7) a different conclusion was arrived at, but the court in that case said: "We have referred to the point rather for the purpose of indicating the correct practice than because of its bearing on the present case." The opinion was therefore *obiter dictum*. This decision was followed by judge FREEDMAN (1 *Civ. Pro. R.*, 292). Judge FREEDMAN did not examine the question, but assumed that it had been settled by the case in 19 *Hun* (*supra*), to which he refers. The same conclusion was incidentally declared in *Hill agt.*

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Hotchkiss (24 Hun, 414). But the result was not reasoned out in any of these cases. It was rather assumed than discussed. While these decisions are entitled to respect, we do not regard them as conclusively establishing the practice. We must settle that for this court according to our understanding of the law. The question resolves itself into this: The trial judge, in the hurry of a jury trial, and without time for deliberation, made a palpable error. After consideration he corrected it. The order he made is conceded to be right; but we are requested to reverse the order to the end that the plaintiff, who was wrongfully defeated at the trial term, may either apply, on a case made, to some other justice at special term, or come back to the general term on an appeal from the order of dismissal, that the error conceded to exist may be corrected — that although the error may be corrected in that form, it cannot be cured in any other. This circumlocutory formula we are told has the sanction of the three cases before cited, and that we must therefore adopt it, however technical. We decline to do so. The provision under consideration does not in our judgment require such a sacrifice of substance for form. It is of a remedial character, and by giving effect to its spirit and intent the power is readily discovered, and we propose to give it effect. The construction we have put upon section 999 (*supra*) is not forced but reasonable, certainly more so than that put by the court of appeals (39 N. Y., 314; 40 *id.*, 551) upon the provision of the Code authorizing a new trial for “excessive damages,” and which that court held was sufficient to warrant a new trial for “inadequacy of damages.” The court in those cases looked more to the intent and purpose of the provision under consideration than to the literal words of the act. We will follow this example in the interest of justice, good practice and sound construction. The order appealed from will therefore be affirmed, with costs.

HAWES, J., concurs.

Murray agt. Hankin.

SUPREME COURT.

RUSSELL MURRAY agt. WILLIAM H. HANKIN, JR.

Attachment — Sufficiency of affidavit for.

An attachment granted upon the affidavit of an agent of plaintiff, who alleged that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of deponent, was properly set aside upon application of a subsequent attaching creditor.

The affidavit would have been sufficient if the allegation of the agent had been that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of plaintiff (DAVIS, *P. J.*, *dissenting*).

First Department, General Term, May, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order denying motion to vacate an attachment made by a subsequent attaching creditor.

Preston Stevenson, for appellant.

L. J. Morrison, for respondent.

BRADY, *J.* — The affidavit upon which the attachment was granted in this case was made by the agent of the plaintiff, who alleges that he is personally acquainted with the facts and circumstances which he proceeds to set forth. The claim consists of a promissory note, payable to the order of the plaintiff, and a sale of merchandise made at a date subsequent to that of the note, and of merchandise also sold to various persons who have assigned their demands to the plaintiff. The agent then states that the plaintiff is justly entitled to recover for these various claims the sum named "over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of deponent."

The subsequent attaching creditor who made the motion

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resulting in this appeal assails the affidavit because it fails to comply with the statute in not averring that the plaintiff is entitled to recover the sum demanded over and above all counter-claims known to him, and this objection seems to be well taken.

Although the Code only requires the necessary facts to be shown by affidavit to the satisfaction of the judge granting the attachment, and although the affidavit may, therefore, undoubtedly be made by an agent who has the necessary knowledge to make the required allegations, nevertheless when the allegations are made they must be in conformity to the statute, and particularly in a case where the attachment is granted upon a variety of claims in part originating with the plaintiff, and in part acquired by him by assignment. The statute requires, among other things, that the plaintiff shall show either by his own affidavit, or by that of somebody in his behalf conversant with the facts, that there are no counter-claims known to him, *i. e.*, known to him, the plaintiff.

The asseveration by the agent that there were no counter-claims known to him might be made with very great propriety, and hence the necessity of the information which is exacted by the statute *non constat*, but that in this case there was a counter-claim to some one or more of the numerous items set forth of which the plaintiff had knowledge, but of which his agent had no knowledge. If the allegation of the agent in his affidavit had been that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of the plaintiff the affidavits would have been sufficient. But the allegation is that it was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the "knowledge of the deponent," *i. e.*, to the knowledge of the agent as already suggested.

Inasmuch as in this case an attachment was demanded for a sum of money which rested partly upon merchandise sold by the plaintiff to the defendant, and partly upon claims

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assigned to him, the affidavits should perhaps show that as to each of the items there was no counter-claim existing in favor of the defendant to the knowledge of the plaintiff, notwithstanding that the affidavit on which the attachment is granted may be made by the plaintiff's agent or attorney in fact.

The objection taken is not to a mere irregularity which the defendant might be regarded as having waived, because he made no objection to it so far as the court is advised. It is to a jurisdictional objection (*Donnell agt. Williams*, 21 *Hun*, 216; *Ruppert agt. Haug*, 87 *N. Y.*, 141).

For these reasons the order made by the court below must be reversed and the motion granted, with ten dollars costs and disbursements of this appeal.

DANIELS, J., concurs.

DAVIS, P. J. (*dissenting*). — I do not think a subsequently attaching creditor ought to be allowed to succeed upon a point of this kind. The defendant in the action by not taking such an objection waives it. The junior attaching creditor ought to be required to show that there were counter-claims or offsets which might be interposed. One creditor should not be allowed to trip up the heel of another prior in diligence without being able to assert some more substantial objection than this. The agent evidently had better, or at least as good, knowledge of the condition of things between the plaintiff and the defendant as the plaintiff himself. His affidavit on this point presents facts upon which the judge in granting the attachment might find the fact asserted to be substantially proved.

I am of opinion that the court below rightfully disposed of the motion.

Cook *et al.* agt. Munn.

SUPREME COURT.

JOSEPH M. COOK *et al.*, as executors of the last will of JOHN MUNN, deceased, agt. MARY E. MUNN, individually, as administratrix of CHARLES S. MUNN, deceased, and as general guardian of his surviving children, and others.

Will—Construction of—Legacy where legatee dies before the testator, in whom vests.

The testator gave a portion of his estate to his son absolutely. The son died before his father, leaving a widow and children. He left creditors, but no property, except that to be derived from his father's estate:

Held, that under the statute, which enacts that the legacy, in case of the death of the legatee before the testator, shall vest in the surviving child or descendant of the legatee, the devised estate, on the death of the testator, vested absolutely in the children of the legatee, and that his widow and creditors have no interest in it.

Special Term, June, 1883.

LARREMORE, J.—John Munn, by his will, gave and devised all his property, real and personal, to his executors, with the direction to convert the same into money, at such time or times as to them should seem best, with full power of sale and authority to make payments on account, from time to time, out of any funds in their hands, among his legatees, before a final distribution of the estate should be made. Upon such distribution, one-fifth thereof was directed to be paid over to his son Charles S. Munn, absolutely.

The testator died December 27, 1882, leaving a widow, Mary E. Munn, and two children, the infant defendants herein. He left creditors, but no property, except that to be derived from his father's estate.

This action is brought for a construction of his father's will and to determine the rights and interests of the parties who have succeeded to the latter's estate. This question necessarily depends upon the following provisions of the statute:

“Whenever any estate, real or personal, shall be devised or

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bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee as if such legatee or devisee had survived the testator and had died intestate" (3 *R. S.* [7th ed.], pp. 2287-2288).

On the one hand it is claimed that this statute should be interpreted in conjunction with the statute of distributions under which the widow and creditors of Charles S. Munn would have an interest in the estate. On the other it is urged that such estate, upon the death of his father, vested absolutely in his children.

The primary inquiry is, what was the intention of the legislature as expressed in the statute above quoted. It contains no words excluding widows or creditors, and for this reason it is sought, inferentially, to include them in its provisions.

Without the aid of the statute the legacy unquestionably would have lapsed, and we turn to the language which it employs to ascertain the legal *status* of those for whose benefit it was enacted. They are therein described as the "surviving child or other descendant of the legatee; and if the language is to be taken literally, neither widows nor creditors are within this line of discrimination. The following cases were cited in support of the exclusive rights of the children: *Van Bueren* agt. *Cash* (30 *N. Y.*, 383); *Drake* agt. *Gilmore* (52 *N. Y.*, 389); *Murdock* agt. *Ward* (67 *N. Y.*, 387); *Luce* agt. *Dunham* (69 *N. Y.*, 386); *Keteltas* agt. *Keteltas* (72 *N. Y.*, 312).

All of these cases involve the construction of a will wherein the testator had designated the class of persons who were to succeed to the interest of the devisee or legatee dying during his lifetime. It was the testator's intention that the court sought to ascertain, and it held in each of them that a widow of a deceased legatee was not included in the class in such

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manner named. The case at bar is different in that the designation is by a general statute and not by the special provisions of a will. Nevertheless, such adjudications, if not strict and controlling precedents, are by analogy pertinent to the present argument. No reason has been offered which would justify the court in disregarding the actual text of the statute. To hold that the wife and creditors came in as in ordinary cases of intestacy would be to do violence to both its letter and spirit. It is enacted that such legacy shall vest in the surviving child or descendant of the legatee. In order that the wife and creditors should participate in a legacy it would be necessary, according to the machinery of our law, that the fund should vest in an administrator for distribution. The construction contended for is contrary to the spirit of the law, because it would always partially, and might in some instances wholly, contravene and thwart the clear intention of the legislature. The statute was obviously framed for the benefit of children and descendants of a deceased legatee. If it were decided that the fund vested in the latter's personal representatives to be disposed of according to the usual course of administration, and such legatee left debts sufficient to consume it, the children and descendants would receive nothing, and their existence would furnish merely a pretext and an occasion for the payment of such debts. It cannot be presumed that the framers of the law intended to legislate for the benefit of creditors in this roundabout manner. Without the statute the legacy would lapse. The statute comes in remedially and provides that if certain persons are in existence such legacy shall not lapse but shall vest in them. Evidently the act was framed for their benefit, and they are the sole beneficiaries contemplated by it.

The remaining clause of the statute, "as if such legatee or devisee had survived the testator and had died intestate," may be given full effect in harmony with the foregoing instruction. It refers to the share and proportions in which the legacy or devise shall vest in the children or descendants, and provides

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that the same shall be divided among them according to the analogy of the statute of distributions, or of descent, according to the nature of the property.

The conclusion is that all of the fund in dispute is the property of the children of Charles S. Munn, deceased, and Mary E. Munn is entitled to its custody as their guardian upon giving the requisite security.

N. Y. COMMON PLEAS.

EMMA R. JOHNSON agt. RICHARD R. JOHNSON.

Alimony — Divorce — Where there is no provision in decree for support, judgment cannot subsequently be amended by inserting such provision.

Where the plaintiff, in her divorce decree, refrained from inserting a provision for her support, on the promise of defendant to pay her money from time to time, she cannot subsequently have the judgment amended by inserting such provision.

General Term, June, 1883.

Before DALY, C. J., VAN BRUNT and J. F. DALY, JJ.

APPEAL by plaintiff from order of special term, made April 15, 1882, denying her motion to amend the judgment of divorce in this action, entered December 15, 1877, by inserting therein a provision allowing alimony to plaintiff, such judgment making no provision on that point. It appears from the plaintiff's motion papers, that although she had demanded alimony in her complaint, yet no provision was made therefor in the judgment, because defendant requested such omission, promising, if she would waive such a provision, he would faithfully pay her moneys from time to time in a fair and reasonable amount, also that he would pay her one-half of his wages every month as long as she needed it, and

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that plaintiff, relying upon such promise, consented to the entry of the judgment without any provision for alimony.

The promise is denied by defendant.

J. F. DALY, *J.*—No ground for reopening this judgment is shown by the moving papers. The plaintiff refrained from taking a decree providing for her support, on the promise of the defendant to pay her money from time to time. If she were content to take such a promise instead of a decree of the court, she must be content now. No charge of fraud can be based on a mere promise, and the judgment cannot be disturbed on that ground.

With the entry of judgment in an action of divorce dissolving the marriage contract the jurisdiction of the court over the parties is terminated, except to enforce the judgment or correct mistakes (*Kamp agt. Kamp*, 59 *N. Y.*, 212).

There is no mistake nor error to be corrected in this case, and the plaintiff must be left with the judgment she knowingly consented to.

Order affirmed; no costs.

DALY, C. J., and VAN BRUNT, J., concur.

SUPREME COURT.

HOWARD IVES, respondent, agt. HENRY B. LOCKWOOD.

Attachment — When person giving certificate may be examined — Sufficiency of affidavit.

Where a party alleged to have property in his hands belonging to the defendant, which should be made the subject of attachment in the action makes certificate to the sheriff that he has no property of defendant and owes no debt to him, an order for the examination of such party should not be granted on an affidavit on information and belief against the positive deposition of the person sought to be examined.

First Department, General Term, August, 1883.]

Before DAVIS, P. J., BRADY and DANIELS, JJ.

Ives agt. Lockwood.

APPEAL by Oliver S. Carter and others, denying a motion to vacate and set aside an order requiring them to attend and submit to an examination, and also directing it to proceed.

Frank E. Blackwell, for appellants.

G. A. Seixas, for respondent.

DANIELS, J.—The appellants were alleged to have property in their hands belonging to the defendant which should be made the subject of attachment in the action. They, however, delivered a certificate to the sheriff, stating that they had no property of any description of the defendant Lockwood, and were owing no debt to him. Upon an affidavit made for that purpose, they were ordered to appear and submit to the examination provided for by section 651 of the Code of Civil Procedure. But this order could only be made when there was reason to suspect that the certificate was either untrue or failed fully to set forth the facts required to be shown by it. The affidavits presented for the order failed to show either of these facts by any legal proof. It was made substantially upon mere information which has been often held to form no basis for legal proceedings, unless it may be in some very exceptional instances, and this was not shown to be one of those instances. In answer to this affidavit the members of the firm of Carter, Hawley & Co. also swore positively that they had no property of the defendant and were not indebted to him. Under this state of the case no right for their examination was substantiated under this section of the Code, and the order denying the motion to vacate the order directing the examination was, therefore, erroneous, and should be reversed and the motion granted, with costs and disbursements of this appeal.

DAVIS, P. J., and BRADY, J., concur.

Cole agt. Rose.

N. Y. MARINE COURT.

CHESTER S. COLE, as captain of the port, agt. JAMES L. ROSE.

Costs—on discontinuance—When leave to discontinue without costs will be granted.

The act of 1862 (*chap. 487*), under which the plaintiff and his associates (the harbor masters) were appointed, having been repealed and the offices created by it abolished, the penalties imposed by the act are not recoverable even in pending actions.

Under such circumstances the court may allow a discontinuance of the action without costs.

Special Term, June, 1883.

MOTION for leave to discontinue without costs.

Charles S. Berry, for plaintiff.

Benedict, Taft & Benedict, for defendant.

McADAM, J.—The plaintiff and his associates (the harbor masters) were appointed under the Laws of 1862 (*chap. 487*), and the action was brought to recover a penalty given by that statute. The plaintiff recovered a judgment, which was reversed upon appeal with the award of a new trial. Since then, *i. e.*, May 4, 1883, the act under which the plaintiff and his associates derived their authority was repealed and the offices created by the said act were abolished. The penalties imposed by said act are in consequence not recoverable, even in pending actions, as the repealing act contains no saving clause (1 *Hill*, 324; 3 *How. Pr.*, 142; 6 *id.*, 281; 35 *Barb.*, 599; 4 *Dallas*, 372; 5 *Cranch*, 281; 6 *id.*, 329; *Sedg. on Stat. Law* [2d ed.], 109). The further prosecution of the action has thus been made impossible by act of the law, and this circumstance entitles the plaintiff to discontinue without costs (*See How. Pr.*, 342; 40 *id.*, 180; 41 *N. Y.*, 355; 3 *Keyes*, 614); and this, notwithstanding the order of the

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general term awarding the defendant costs to abide the event. In *Van Wyck* agt. *Baker* (11 *Hun*, 309) it was held that under ordinary circumstances such an order of the general term precluded a discontinuance without costs. But in that case the discontinuance was applied for simply because the plaintiff did not desire to continue his prosecution of the action. In the present instance the prosecution is, as before suggested, practically stopped by act of the law, a matter over which the plaintiff had no control. The distinction between the two cases is obvious (*See 4 N. Y.*, 411).

The motion for leave to discontinue, without costs, will therefore be granted.

N. Y. SUPERIOR COURT.

ROBERT SEAMAN agt. ANTHONY McREYNOLDS.

Bankruptcy — Judgments — When motion to cancel judgments against a bankrupt will be denied — Code of Civil Procedure, section 1268.

A judgment against a bankrupt will not be discharged under section 1268 of the Code of Civil Procedure where it appears by affidavit that the judgment was recovered not against defendant alone, but jointly with another and is not the judgment covered by the discharge of the bankrupt, and that plaintiff had no knowledge, actual or constructive, of the bankruptcy proceedings, that he was not named in the proceedings as a creditor and that the omission of the name of plaintiff as a creditor and the substitution of a similar name was with fraudulent intent.

Special Term, August, 1883.

MOTION under section 1268 of the Code to cancel and discharge of record judgments in favor of plaintiff, and against defendant, recovered in this court — one on May 28, 1875, for \$1,591.36, and another for \$436.04, on March 25, 1876 — by reason of defendant's discharge in bankruptcy on October 15, 1880.

Hardy agt. Peters.

O'GORMAN, J. — The following objections are raised by affidavit on part of the plaintiff:

First. That the judgments were recovered, not against defendant alone, but jointly with Thomas O'Callaghan, and are not the judgments covered by the discharge of the bankrupt.

Second. That plaintiff had no knowledge, actual or constructive, of the bankruptcy proceedings and no notice was served on or mailed to him, although he was a well known resident of the city of New York; that he was not named in the proceedings as a creditor, but that one "William Seaman" was named as a judgment creditor, and notice appears to have been mailed to that name; and that the omission of the name of the plaintiff as a creditor and the substitution of the name "William Seaman" was fraudulent and for the purpose of obtaining a discharge in bankruptcy without opposition.

The objections are well taken. The irregularity and omissions of the judgment debtor, with the fraudulent intent alleged in the affidavit of the plaintiff, vitiate the discharge in bankruptcy and render it invalid as to the judgments recovered by the plaintiff (*See Willard on Bankruptcy, secs. 23, 24, 25, 38; Small agt. Graves, 7 Barb., 576; Ayres agt. Scribner, 17 Wend., 407*).

The motions to cancel the judgments are denied, with ten dollars costs.

SUPREME COURT.

THOMAS A. HARDY, respondent, agt. CHARLES G. PETERS
and others, appellants.

Examination before trial — When order properly granted.

In an action by a customer against his stockbrokers to recover damages alleged to have been sustained by the wrongful sale of stocks, the defense was that the sales were properly consummated upon due notice to plaintiff, by whom they were ratified. An order for the examina-

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tion of plaintiff before trial was granted on affidavits that during a part at least of the period covering the transactions the plaintiff was not in the city of New York, and most of the notices were sent by telegram, and that it was desired and expected to prove that plaintiff did receive some or all of the notices so sent to him:

Held, that the order was improperly vacated on the ground that it was sought only to find out what the plaintiff would swear to, and that the examination should be allowed, notwithstanding the plaintiff alleged in his complaint that defendants never demanded margins or collateral securities.

First Department, General Term, June, 1883.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from an order vacating an order for the examination of the plaintiff before trial.

C. L. Rives, for appellant.

J. Warren Lawton, for respondents.

BRADY, *J.* — This action was brought by a customer against his stockbrokers to recover damages alleged to have been sustained by the wrongful sale of stocks. The answer admits that the sales referred to were made, but alleges that they were properly consummated and upon due notice to the plaintiff, by whom they were ratified. Upon the pleadings and the affidavits of the defendant Peters and one of the defendants' attorneys, an order was granted for an examination of the plaintiff as a witness before trial. Upon the return day of the order the plaintiff's counsel, upon the defendants' papers, moved to vacate it and the motion was successful, the learned justice presiding stating it to be his opinion that the applicant sought only to find out what the plaintiff would swear to, so as to enable him to meet and overcome it. The papers on which the order for the examination of the plaintiff was predicated were sufficient, *prima facie*, in form to entitle him to such examination, and, as will appear, in matters of substance as well. The gravamen of the defense is the notifica-

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tion, which relates not only to demands for margin, but also to the time and place of the intended sale of the stocks of which complaint is made.

The affidavit of Mr. Peters shows that the plaintiff, during a part at least of the period covering these transactions was not in the city of New York, and that most of the notices were sent by telegram, and the allegation is that they desire and expect to prove that the plaintiff did receive some or all of the notices so sent to him, and when and where he received them. It is true that the plaintiff in his complaint alleges as follows:

“That defendants never demanded of plaintiff that he should deposit collateral security or margin, nor was there at any time any suggestions made or notice given to plaintiff by said defendants that said collateral security was desired or required by defendants before the alleged sale of stocks as hereinafter mentioned.”

But the defendants are not absolutely bound by this declaration, and although the means of proving these facts and the delivery of the notices by telegram at the offices to which they were sent may be accessible, it is quite apparent that proof of their actual delivery may be attended with many difficulties from which the defendants ought to be relieved. In reference to these notices and demands for margin or collateral security, it may be said, it is true, that if the plaintiff upon his examination adheres to the statements made in the complaint, of course the examination will not result in any advantage to the defendants. But of this the court cannot be assured from anything present before it. *Non constat* but that some fact and circumstances will be revealed upon the examination which would justify the inference that the plaintiff was mistaken in the allegation made, arising either from forgetfulness or other circumstances about which it is not necessary to indulge in any conjectures.

If the application here were regarded as a fishing expedition it would not be entertained for a moment, and this court would

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concur readily and cheerfully in the result expressed by the learned justice in the court below. But the court is not impressed that such is the character of the application. The plaintiff appears to have been traveling from place to place during a part of the period over which the transaction extended, and, if the telegrams were sent, it seems to be unjust to withhold, under our existing statutes, the right of examining him for the purpose of ascertaining whether he received them or not.

We do not deem it necessary to go into the consideration of the adjudications in reference to this subject, because, whenever it appears that the examination of an adversary is material and necessary, and the application is one not for the purpose of extracting evidence from him by unnecessary procedure, and when its good faith cannot be seriously questioned, it is almost a matter of course, under our statute, to direct the examination in the furtherance of justice.

In this case, upon the papers presented, all these elements are apparently present, and for that reason it is thought that the order appealed from should not have been made under the circumstances. It is further thought that it should be reversed, with ten dollars costs and disbursements of the appeal.

DAVIS, P. J., and DANIELS, J., concur.

COURT OF APPEALS.

FRANCIS R. LEWIS, respondent, agt. J. L. STEVENS, appellant.

Bail — Allowance of, made upon regular notice — When will not be set aside.

The court cannot set aside an allowance of bail made upon regular notice, on account of excusable neglect of plaintiff's attorney to attend at the justification.

When a sheriff has once been legally discharged from his liability as bail, he cannot be reinstated therein (*Reversing S. C.*, 48 *N. Y. Superior R.*, 559).

Decided, June, 1883.

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DEFENDANT had been arrested by the sheriff of the city and county of New York, and had given bail. Plaintiff served notice that he did not accept the bail, and notice of justification was given. On the day when the bail were to justify, plaintiff's attorney, who had been absent from the city, was delayed upon his return, and his clerks neglected to attend to the matter. The bail were allowed upon plaintiff's default and the bail piece approved and filed. Plaintiff's attorney moved to vacate the allowance of the bail. The motion was denied by the special term, but this order was reversed by the general term, from which last order defendant and the sheriff appealed.

Henry D. Hotchkiss, for plaintiff.

A. J. Dittenhoeffer, for defendant.

Malcolm Graham, for sheriff.

RUGER, C. J.— This is an appeal from an order of the general term reversing an order of the special term, denying a motion to open a default taken upon a hearing for the justification of bail upon an arrest in the action. The defendant and sheriff each had notice of the motion; each appeared in opposition thereto, and each appeals from the decision of the general term.

It is provided by section 580 of the Code of Civil Procedure, that for the purpose of justification each of the bail must attend before the judge at the time and place mentioned in the notice and be examined on oath touching his sufficiency. It is further provided that the judge may adjourn the examination from day to day in his discretion until it is completed, but such adjournment is required to be to the next judicial day, unless by consent another day is agreed upon.

Section 581 provides: "If the judge finds the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon and cause them to be filed with the clerk." The sheriff is thereupon exonerated from liability.

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The allowance of bail by the judge in this case was made upon regular notice, and all of the proceedings relating thereto were regularly taken in conformity with the Code. The contingency had occurred upon which the statute declares the sheriff discharged from liability. We do not think that any power exists in the court to renew his liability (*Ballard* agt. *Ballard*, 18 *N. Y.*, 491; *Butler's Bail*, 1 *Chitty R.*, 83; *Petendorff on Bail*, 318; *Trumbull* agt. *Healy*, 21 *Wend.*, 670; *Cornell* agt. *Reynolds*, 1 *Cow.*, 241).

The question involved is one of power, and the court have no right to speculate as to the effect of the order. The sheriff has once been legally discharged from his liability, and he cannot be reinstated as a surety except by express statutory authority. We believe that none such exists.

When the court have power to relieve a party from the consequences of a default, it is a question of discretion in the courts below as to whether they will do so or not. The circumstances existing in this case would very well justify the action of the court were this a proper case for the exercise of such power. The sheriff occupies the position of a surety, and his rights are *strictissimi juris*, being once discharged from his liability it cannot be revived against his objection.

We think the order of the general term should be reversed and that of the special term affirmed.

All concur.

DIGEST

CONTAINING THE WHOLE OF

65 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 28 AND 29 HUN, AND 90 AND 91 N. Y. REPORTS.

Attention is called to the four additional headings "CODE OF PROCEDURE," "CODE OF CIVIL PROCEDURE," "CODE OF CRIMINAL PROCEDURE" and "PENAL CODE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of the Codes.

ABATEMENT AND REVIVAL.

1. The provision of the Code of Civil Procedure (*sec. 757, as amended by chap. 542, Laws of 1879*), providing for the continuance of an action "in case of the death of a sole plaintiff or a sole defendant," when the cause of action survives, applies to a case where a sole plaintiff and a sole defendant are both dead. (*Holsman agt. St. John, 90 N. Y., 461.*)

2. It is obligatory upon the court to grant a motion to revive, made upon proper affidavits showing the necessary facts; no mere lapse of time can defeat the application. (*Id.*)

ACCOUNTING.

1. In an action by an attorney to recover for professional services rendered to a client, his claim, as stated in a bill of particulars, consisted of ten items, six of which were for consultations, one for counsel fee and consultation, one for drawing the complaint, one for demanding property of a sheriff and one for attending upon the justification of bail: *Held*, that the action did not involve the examination of a long account, and that it could not be referred

without the consent of the defendant. (*Merritt agt. Vigelius, 28 Hun, 420.*)

2. The question of referring actions brought by attorneys to recover the value of professional services rendered to their clients, considered. (*Id.*)

ACTION.

1. A loan of \$6,000 was made by A. to B., as president of a corporation, B. giving as collateral security \$6,000 of the corporation's bonds, of which he was the owner. The indebtedness was not paid, and A. caused the bonds to be sold at auction. They were purchased by one C. for the nominal sum of \$640, in the interest of and for A., the seller of the bonds. A judgment was recovered by C. against R., who was trustee of the corporation, for the amount of the bonds, upon the ground that the trustees had failed to comply with the statutory requirement as to filing annual reports. C., without the knowledge of A., satisfied the judgment and it was discharged of record. A motion to set aside the satisfaction because A. was the real owner of the judgment, was denied. A. then, in a

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suit in his own name against R. and the other trustees for the same defaults in filing annual reports, recovered a judgment for the loan to the corporation. The fact that A. sued in C.'s name, and that both claims belonged in fact to A., were unknown to R. and his co-trustees until long after both judgments were obtained. R. then brought this action to enjoin A. from enforcing his judgment:

Held, that the action sought to be enjoined being clearly an attempt to recover the same penalty twice by a course of proceeding altogether indefensible in equity and morals, the court below was entirely justified in holding the defendant strictly to consequences that followed on the recovery of the first judgment and compromise and discharge thereof by the accomplice of the defendant in the wrongful scheme to extort the double penalty (*Affirming S. C.*, 61 *How.*, 128). (*Roach* agt. *Duckworth*, ante, 303.)

2. In May, 1882, issue was joined in an action commenced upon a promissory note just as it was on the point of outlawing. An order for a commission with a stay of proceedings until its return was obtained by the defendant. The commission was never returned, and in 1875 the stay was vacated by consent, after which time the cause was placed on the calendar. In December, 1876, the plaintiff, at the defendant's request, allowed the case to go over the term, and it was then marked as reserved generally. The defendant had not noticed the cause for trial, but his attorney had repeatedly requested the plaintiff to bring the cause to trial, and younger issues had been tried. On January 24, 1880, an order was made on the defendant's application dismissing the complaint: *Held*, that the court properly granted the motion made by the defendant to have the complaint dismissed upon the ground of the

unreasonable delay of the plaintiff in prosecuting the action. (*James* agt. *Shea*, 28 *Hun*, 74.)

3. Where a judgment dismissing the complaint has been entered upon an order directing its dismissal because of the unreasonable delay of the plaintiff in prosecuting the action, the plaintiff, if he desires to review the action of the court, should appeal from the order and not from the judgment. (*Id.*)

ADDITIONAL ALLOWANCE.

1. In this action, brought by a stockholder of the defendant, The Saratoga County Bank, the complaint alleged that the bank and its directors had committed unlawful and improper acts, and prayed for an injunction restraining the defendant from exercising its corporate rights, and from making any payments or transferring any of its property. Upon an application for an extra allowance made by the defendant after a dismissal of the complaint: *Held*, that the subject-matter involved, upon which the extra allowance should be computed, was the value of the corporate franchise.

That the value of the franchise was, at least, as much as the value of the assets of the corporation over and above all debts due from it. (*Conaughty* agt. *Saratoga County Bank*, 28 *Hun*, 373.)

2. This action was brought to dissolve a corporation, to restrain it from exercising its franchises and to procure the appointment of a receiver. An answer, put in by the defendant, was subsequently withdrawn, and judgment was taken against it by default. Upon an appeal from an order granting an extra allowance: *Held*, that as the subject-matter involved was the existence of the franchise any allowance must be based upon its value, and that as no proof was

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given to show that the franchise had any value, the court erred in granting an extra allowance. (*People* agt. *Rockaway Beach Improvement Co.*, 28 Hun, 356.)

ADJOURNMENT.

1. A motion to adjourn in the marine court is addressed to the discretion of the trial judge, and although it is subject to review by the general term of that court, such discretion cannot be reviewed on appeal to the court of common pleas. (*Brown* agt. *Moran*, ante, 349.)
2. A party is not entitled to an adjournment on account of the absence of a material witness, unless it is made to appear that the attendance of the witness can be procured within a reasonable time. (*Id.*)
3. Where willful trespass is committed, the question of negligence does not arise. (*Id.*)

ADVERSE POSSESSION.

See SPECIFIC PERFORMANCE.
Schultz agt. *Rose*, ante, 75.

See EJECTMENT.
Manolt agt. *Petrie et al.*, ante, 206.

AFFIDAVIT.

1. Affidavits that about a week after defendant's goods, amounting to about \$250, were delivered to the defendant, he made a general assignment for the benefit of his creditors, with \$10,000 of preferences, and that plaintiff's goods, which were adapted to defendant's business, could not be discovered in his store, are insufficient upon which to grant an attachment when the assignment was assailed by no fact indicating it

to have been in any respect inconsistent with the legal rights of defendant's creditors, and no probably fraudulent disposition of the goods was shown. (*Wilmerding* agt. *Cunningham*, ante, 344.)

2. A statement in an affidavit that other affidavits had been made and were on file in the office of the clerk, from which it appeared that defendant had purchased goods which had in like manner disappeared, did not strengthen plaintiff's case in the absence of extracts from these affidavits containing a statement of the facts referred to. (*Id.*)
3. Where an affidavit for the examination of a defendant before trial details the circumstances as to which proof will be required, which it is expected the defendant will be able to give in such a manner as to establish to a reasonable certainty its materiality, followed by an expression of belief that the examination and testimony of the defendant relative to the issues are both material and necessary to the plaintiff for the prosecution of the action, the requirements of the fourth subdivision of section 372 of the Code are sufficiently complied with. (*Hogg* agt. *Fisk*, ante, 351.)
4. Where a subsequent attaching creditor seeks to vacate a prior attachment upon the property of the insolvent debtor, there must be proof of a subsequent valid levy upon the same property covered by the prior attachment, and the affidavit of the attorney for the moving creditor that an attachment against the property of the defendant was granted in his client's suit and the warrant was duly issued to the sheriff, who had by virtue thereof attached the property of the defendant, and that the said attachment was in force and the action pending, is not sufficient for that purpose. (*Sine* agt. *Smith*, ante, 358.)

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5. It appeared that after the prior attachments were issued, and apparently before the attachment of the moving creditor, an agreement in writing was entered into between the plaintiffs in the prior attachments and the assignee of the insolvent debtor, by which the said plaintiffs impliedly abandoned any attempt to perfect a levy upon the property of the debtor, in consideration of an agreement by the assignee to hold a certain sum in his hands and to pay it over to the plaintiffs in the prior attachment suits in case they eventually obtained judgment in said suits; and the sheriff made affidavit alleging not only that he had not levied upon or acquired a lien upon any property by virtue of said attachments, but that he had never been able to discover property of the defendant in such attachments liable to be levied upon:

Held, that as it is thus conclusively shown that neither the prior or subsequent attaching creditor has any lien upon any property belonging to the debtor, and the moving creditor has no legal interest in the question as to the validity of said prior attachments, he has not brought himself within the requirements of the Code entitling him to move to vacate them. (*Id.*)

6. Though there may be an abundant recapitulation of facts and circumstances in an affidavit, asserted on information and belief, to show that defendant had assigned and disposed of his property with intent to defraud his creditors, yet to permit the issuing of an attachment, the information must be authenticated by the person from whom it had been obtained. (*Wallach* agt. *Sippili*, ante, 501.)

7. An affidavit showing that the person making it had called at the residence of the defendant and endeavored to secure an interview

with him, which was refused under the asserted authority of the defendant, is not sufficient for the allowance of an attachment on the ground that defendant kept himself concealed to avoid the service of a summons. (*Id.*)

8. An attachment granted upon the affidavit of an agent of plaintiff, who alleged that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of deponent, was properly set aside upon application of a subsequent attaching creditor. (*Murray* agt. *Hankin*, ante, 511.)

9. The affidavit would have been sufficient if the allegation of the agent had been that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of plaintiff (*DAVIS, P. J., dissenting*). (*Id.*)

10. Where a party alleged to have property in his hands belonging to the defendant, which should be made the subject of attachment in the action makes certificate to the sheriff that he has no property of defendant and owes no debt to him, an order for the examination of such party should not be granted on an affidavit on information and belief against the positive deposition of the person sought to be examined. (*Ives* agt. *Lockwood*, ante, 518.)

ALBANY (CITY OF).

1. The provision in the general appropriation act of 1875 that "the compensation of the men employed as firemen in the capitol is hereby fixed at three dollars per day to each of them; said salaries shall be paid upon the certificate of the keeper of the capitol," is prospective and applies to firemen

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in the capitol employed subsequent to the year in which such appropriation act was passed. (*Kehn* agt. *The State*, ante, 488.)

2. The pay of a fireman to which this provision is applicable cannot be reduced except by law, as his case falls within the decision of this court in *People* agt. *Board of Police* (75 N. Y., 42). (*Id.*)
3. In applying the principle that a statutory salary cannot be reduced except by law, it is immaterial whether the person whose salary is so fixed is or is not an officer so long as he is specified in the statute fixing his salary. (*Id.*)
4. The acceptance of reduced pay for a portion of the time that services are rendered does not operate as an estoppel from afterwards recovering in an action the full rate prescribed by the statute. (*Id.*)

ALIENS.

1. C. H., a naturalized citizen, died in 1874, leaving seven brothers and sisters or their children, as his only next of kin. They were all non-resident aliens, residing in Wurtemberg, except the defendant R. and the plaintiff and his sister, and a nephew of the deceased, J. P. M. H., who was a resident alien. The defendant R. was a daughter of a deceased sister of C. H., and at his death was the wife of a citizen, and resided in this country. She was the only person who could directly inherit from her uncle, and she took possession of real estate belonging to him in this city, claiming to be the sole owner. Mrs. W., mother of plaintiff, in 1875 sold her right to her brother's property by virtue of the treaty to her son, the plaintiff, who thereupon brought this action to have it adjudged that he and the children of his deceased sister were entitled to share in his uncle's property:

Held, 1st. That the objection that the alleged non-resident alien infant heirs of H. were not made parties to this action is not valid.

2d. The provision in the treaty between the United States and the kingdom of Wurtemberg which provides that "where, on the death of any person holding any property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other where he not disqualified by alienage, such citizen or subject shall be allowed two years to sell the same, which term may be reasonably prolonged according to circumstances and to withdraw the proceeds thereof without molestation and exempt from all duties," is in effect a statute of limitation. As there has been no prolongation, the time prescribed by statute must apply.

3d. The words "resident aliens," in the provision of the act of 1845, to enable resident aliens to take and hold real estate (*sec. 4, chap. 115, Laws of 1845*), which enables those answering the description of heirs of a deceased alien to take whether they are citizens or aliens, do not include or designate a "naturalized citizen."

4th. The act of 1874 (*chap. 261, Laws of 1874*) amending the act of 1845 by inserting after the words "resident alien" the words "or any naturalized or native citizen" does not apply to this case, because the rights of the parties had become vested and fixed before the act was passed (*See Renner* agt. *Muller*, 57 How., 229). (*Wieland* agt. *Renner*, ante, 245.)

ALIMONY.

1. Where the plaintiff, in her divorce decree, refrained from inserting a provision for her support, on the promise of defendant to pay her money from time to time, she cannot subsequently have the judgment amended by inserting such

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provision. (*Johnson* agt. *Johnson*, ante, 517.)

2. It is only when an action is brought by a wife for divorce or separation, as prescribed by the Code of Civil Procedure, section 1766, that an allowance for alimony is proper. (*Ramsden* agt. *Ramsden*, 91 N. Y., 281.)

3. Where, therefore, the complaint in an action by a wife against her husband alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance: *Held*, that the court had no jurisdiction to make an order granting alimony *pendente lite* or counsel fees. (*Id.*)

ALLOWANCES.

See ASSIGNEES.

Matter of Burbank, ante, 129.

AMENDMENT.

See SUMMONS.

Gibbon et al. agt. *Freel*, ante, 273.

1. Where a tender is not pleaded, and the trial is by the court, although proof is made on the trial of a tender, or a waiver thereof, a refusal of an application to have the answer amended to conform to the proof, made after the trial and after the findings have been prepared and ready for signature, is not error. (*Sidenberg* agt. *Ely*, 90 N. Y., 257.)

2. An amendment of a notice of appeal from an order denying a motion for a new trial, so as to make it also a notice of appeal from a judgment, may not be granted after the time for appealing from the judgment has expired, as the effect of the amendment is to allow an appeal from the judgment, which the court has no power to do (*Code of Civil Pro.*, secs. 783,

784). (*Lavalle* agt. *Skelly*, 90 N. Y., 546.)

3. Neither the provision of the Code of Civil Procedure (sec. 1803) authorizing omissions to be supplied, or amendments to be made to perfect an appeal; nor the provision (sec. 724) allowing the court "to supply an omission in any proceedings," or to "permit an amendment thereof," apply to the case of such an amendment. (*Id.*)

ANIMALS.

1. The fines imposed and collected for offenses under section 6 of chapter 12, Laws of 1874, should be received by the Society for the Prevention of Cruelty to Animals. (*American Society for the Prevention of Cruelty to Animals* agt. *Doyle*, ante, 459.)

2. But an action cannot be sustained against the recorder of the city of Cohoes, who has in good faith paid over the money so received by him for such fines to the chamberlain of such city before any demand was made therefor by the plaintiff. (*Id.*)

ANSWER.

1. Where a demurrer is served, an answer may be interposed by way of amendment. (*Adams & Lang* agt. *West Shore, etc., Railroad Company*, ante, 320.)

See PLEADING.

Grinnell agt. *Church*, ante, 399.

APPEAL.

1. Under the new Code, as before, the decision of a district court justice upon motion to vacate an attachment which had been previously issued in the action may be reviewed on appeal. (*Lang* agt. *Marks*, ante, 127.)

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2. Under section 1294 of the Code, an attorney, though not a party to the action, can appeal from an order refusing his fees. (*Louden* agt. *Louden*, ante, 411.)
3. A discretionary order is appealable to the general term when it affects a substantial right. (*Id.*)
4. Prior to the amendment of section 8046 of the Code of Civil Procedure, in 1882, it was not necessary that a notice of appeal should be actually subscribed by the appellant or his attorney; it was sufficient if the name of the appellant's attorney, with his business address, were indorsed upon the back of the notice. (*Gutbrecht* agt. *Pros. Park and C. I. R. R. Co.*, 28 *Hun*, 497.)
5. An omission to subscribe a notice of appeal may be cured by amendment, under section 8049 of the Code of Civil Procedure. (*Id.*)
6. Any act on the part of the appellant which constitutes a step in the proceeding to appeal, and which evinces his intention in good faith to perfect and prosecute his appeal, is a sufficient ground for an amendment under the said section. (*Id.*)
7. The execution of a judgment directing the sale of mortgaged premises may be stayed, upon appeal, by giving an undertaking against the commission of waste and for the payment of the value of the use and occupation of the premises as provided in the first sentence of section 1331 of the Code of Civil Procedure, or by giving an undertaking for the payment of any deficiency which may occur upon the sale, as provided in the second sentence thereof. The first sentence, as well as the last, applies to appeals taken from judgments directing a foreclosure and sale. Section 1327 of the Code of Civil Procedure applies only to judgments or orders requiring the payment of a sum fixed, or which may be fixed by a simple computation. It does not apply to judgments for deficiencies. It is not the province of courts to decide abstract questions of law disconnected from the granting of actual relief. (*Grew* agt. *Garlock*, 29 *Hun*, 598.)
8. A copy of a judgment signed by the clerk of the court and a notice of the entry thereof signed with the name of the attorney, but not indorsed or subscribed with his office address or place of business, was served upon the defendant, against whom judgment was recovered: *Held*, that such service was irregular and void, and did not set in motion the statute limiting the time within which an appeal could be taken. (*Langdon* agt. *Evans*, 29 *Hun*, 652.)
9. A party cannot sustain on appeal a verdict in his favor, upon a ground taken from him by the trial court. (*Wangler* agt. *Swift*, 90 *N. Y.*, 38.)
10. In an action brought to dissolve an insolvent life insurance company, and to distribute its assets, certain policyholders were allowed to intervene. Upon motion of their attorneys, the special term ordered a reference to take proof and recommend whether any allowances should be made to said attorneys, or if so, to what amount. Subsequently, a motion to resettle and modify the terms of said order, so as to show a granting or denial of the applications for allowance, was denied. Both orders were reversed by the general term: *Held*, that its decision was not reviewable here, as the orders were entirely discretionary. (*Attorney-General* agt. *Continental Life Ins. Co.*, 90 *N. Y.*, 45.)
11. A temporary injunction is unauthorized when it does not appear from the complaint that plaintiff

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- is entitled to the final relief for which the action is brought (*Code of Civil Pro., sec. 603*). (*McHenry* agt. *Jewett*, 90 N. Y., 58.)
12. The granting of the injunction in such case is error of law which may be reviewed in this court on appeal (*Code of Civil Pro., sec. 190, subd. 2*). (*Id.*)
13. The rule that an appellate court will presume in support of a judgment in an action tried by the court or referee, that material facts appearing in the case, not embraced in the express findings, were found and considered, applies only to such facts as being found would tend to support the special findings. In respect to inconsistent facts not conclusively established by the evidence, there is no such presumption. (*Armstrong* agt. *Du Bois*, 90 N. Y., 95.)
14. Where, therefore, in an action of ejectment, the defendants relied upon a paper title, and this issue was found in their favor: *Held*, that the judgment could not be sustained on the ground of title by adverse possession, although facts were proved tending to show such title, but which were not conclusive or incapable of contradiction, and the question did not appear to have been raised upon the trial. (*Id.*)
15. Also, *held*, that for the same reasons it was not open to defendants to claim upon appeal that plaintiffs showed no title to the premises. (*Id.*)
16. An order of general term denying an application for a reargument is not reviewable here. Whether more than one argument of a question shall be had is exclusively for the court in which it is pending to determine. (*Fleischmann* agt. *Stern*, 90 N. Y., 110.)
17. In an equity case a new hearing will not be granted, or judgment reversed, merely on the ground that proper evidence was rejected at the trial, if, on all the facts and circumstances, the court is satisfied that the result ought not to have been different if the evidence had been received. (*In re N. Y. C. & H. R. R. Co.*, 90 N. Y., 842.)
18. A proceeding to punish for an alleged criminal contempt, originating in the violation of an order granted in a civil action, is a civil special proceeding within the meaning of the Code of Civil Procedure (*secs. 1356, 1357*), and an order therein finding the party proceeded against guilty, and imposing a punishment, is reviewable here upon appeal (*Sec. 190, subd. 3*). (*People ex rel. agt. Dwyer*, 90 N. Y., 402.)
19. As to whether an appeal is proper from an order punishing a disobedience of an order of a criminal court in a criminal action, *quære*. (*Id.*)
20. Where the sureties to an undertaking, given to stay proceedings on appeal to General Term from a final judgment, are excepted to, and they fail or refuse to justify, and justification is not waived by the respondent, the sureties are discharged from liability; the effect of the failure to justify "is the same as if the undertaking had not been given" (*Code, secs. 1352, 1353*). (*Manning* agt. *Gould*, 90 N. Y., 476.)
21. As to whether the respondent may after exception taken, and before the refusal of the sureties to justify, waive the exception, *quære*. (*Id.*)
22. An amendment of a notice of appeal from an order denying a motion for a new trial, so as to make it also a notice of appeal from a judgment, may not be granted after the time for appealing from the judgment has ex-

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- pired, as the effect of the amendment is to allow an appeal from the judgment, which the court has no power to do (*Code of Civil Pro.*, secs. 783, 784). (*Lavalle* agt. *Skelly*, 90 N. Y., 546.)
23. Neither the provision of the Code of Civil Procedure (*sec.* 1838) authorizing omissions to be supplied, or amendments to be made to perfect an appeal; nor the provision (*sec.* 724) allowing the court "to supply an omission in any proceedings," or to "permit an amendment thereof," apply to the case of such an amendment. (*Id.*)
24. Where there is simply a general objection to evidence, the decision of the trial court overruling the same will be sustained unless there be some ground which could not have been obviated if it had been specified, or unless the evidence called for was in any aspect of the case incompetent. (*Quinby* agt. *Strauss*, 90 N. Y., 664.)
25. An order denying a motion to modify an order vacating an assessment is not reviewable here. (*In re Loew*, 90 N. Y., 666.)
26. Where, after the death of a party, notice of appeal from an order is served upon his attorney, the appellant cannot object, on motion by said attorney to dismiss appeal, that he has no standing in court because of the death of his client. Having called the attorney into court as the proper representative of the deceased, the appellant may not object to his being heard. (*In re Beckwith*, 90 N. Y., 667.)
27. As to whether the provision of the Code of Criminal Procedure (*sec.* 527, as amended in 1882, chap. 860, *Laws of 1882*), providing that "the appellate court may order a new trial if it be satisfied" that justice requires it, although no exceptions were taken on trial, applies to this court, *quære*. (*People* agt. *McGloin*, 91 N. Y., 241.)
28. In an action against an executor, costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer: *Held*, that as defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by the Code of Civil Procedure (*Sec.* 1836). (*Meltzer* agt. *Doll*, 91 N. Y., 865.)
29. Where, upon motion for a peremptory writ of *mandamus*, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, after a decision denying such motion, a motion on the part of the relator to modify the order so as to permit an alternative writ to issue is addressed to the discretion of the court, and its decision thereon is not reviewable here. (*People ex rel. Hartf. L. & An. Co.* agt. *Fairman*, 91 N. Y., 885.)
30. A misdirection by the court upon the question of the burden of proof, upon the trial by jury of specific questions of fact in an action triable by the court, may, "in the discretion of the court which reviews it, be disregarded, if it is of opinion that substantial justice does not require that a new trial should be granted (*Code of Civil Procedure*, *sec.* 1008). (*Post* agt. *Mason*, 91 N. Y., 589.)
31. An appeal does not lie to this court from an order vacating an attachment, unless it appears in the order appealed from that the attachment was set aside for want of power to grant it, or upon some ground involving jurisdiction of the court. (*Callin* agt. *Ricketts*, 91 N. Y., 668.)

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ARREST.

1. The reason of the common-law rule in regard to the joinder of the husband with the wife has wholly ceased to exist ; and the rule itself has been abrogated in all cases, of torts as well as contracts, affecting the separate property of a married woman, or connected with or arising from the management or control of her business ; and the exemption of a married woman from arrest, which sprang solely from the reason of the rule, has ceased in all cases in which the law expressly authorizes the arrest of females in general terms. (*Muser* agt. *Miller*, ante, 283.)
2. An execution can be issued against the person, without a previous order of arrest, only in a case where the complaint must and does state a cause of action covered by section 549 of the Code of Civil Procedure, and not in a case in which, while the complaint does show a cause for an arrest, such allegations are not necessary to the cause of action alleged, although the plaintiff would be entitled to an order of arrest upon showing, by affidavits, the facts extrinsic to the cause of action, as required by section 550. (*Aetna Ins. Co.* agt. *Shuler*, 28 *Hun*, 838.)
3. This action was brought by the plaintiffs, who were engaged in business in the city of New York, to recover the price of merchandise there sold to the defendants, who were engaged in carrying on business in the city of Mobile, in the state of Alabama. An order of arrest was granted and served upon the defendant Frenkel here, upon the ground that since the purchase of the goods the defendants had fraudulently disposed of their property in the state of Alabama with the intent to defraud their creditors: *Held*, that the order was properly granted under subdivision 2 of section 550 of the Code of Civil Procedure, providing for its issue in actions upon contracts, where the defendant has, since the making of the contract, removed or disposed of his property with the intent to defraud his creditors; and that the fact that the property so disposed of was situated without the limits of this state was immaterial. (*Claflin* agt. *Frenkel*, 29 *Hun*, 288.)
4. A defendant who is released from arrest, by an order imposing as a condition of such release that he shall stipulate not to bring an action for damages for false imprisonment, and who does so stipulate and obtains his release under such order, is not entitled on appeal to have so much of the order as imposed the condition reversed. (*Id.*)
5. Where the warrant issued under the Stilwell act for the commitment of a debtor, did not require the performance of any specific act, he was entitled to a discharge under section 302 of the old Code, when it was shown that he was unable to perform any of the acts required by the statute to enable him to procure his discharge. *Quare*, as to whether, since the repeal of section 303 of the old Code, any way exists whereby a person committed under the Stilwell act, prior to September 1, 1880, can procure his discharge. (*Russak* agt. *Subey*, 29 *Hun*, 491.)
6. In an action to recover for goods sold the complaint contained no allegations of fraud on the part of the vendee; an order of arrest, however, was issued and executed, and upon the trial plaintiff gave evidence tending to show that at the time of making the purchase and to induce the credit defendant made false representations as to his solvency. The court in submitting the question of fraud to the jury stated in substance that if the facts as to the fraud claimed by plaintiff were found by the jury, the law gave him

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an additional remedy, i. e., a body execution and imprisonment under it, and it was for the jury to determine whether plaintiff was to have this right as the result of their verdict or simply to be remitted to the ordinary rights of a creditor: *Held*, no error (*Code of Civil Pro.*, sec. 1487). (*Keller* agt. *Strasburger*, 90 N. Y., 879.)

ASSIGNMENT.

1. A party to a decree in equity, upon an accounting by an assignee for the benefit of creditors which adjudges that the assignee has in his hands a certain sum of money out of which he is directed to pay certain sums, cannot docket a judgment personally against the assignee as a matter of course (*J. F. DALY, J., dissenting*). (*Matter of Jung, ante*, 476.)

ASSIGNEES.

1. The rules which prevail in regard to allowances to trustees, to reimburse them for expenses necessarily incurred in the execution of their trusts, apply to assignees for benefit of creditors. (*Matter of Burbank, ante*, 129.)
2. In the ordinary performance of such duties as an assignee for the benefit of creditors assumes, he at least engages his own personal competency to perform them, and he cannot involve the estate in the expense of employing counsel to advise him as to duties he has thus assumed, unless it were shown that some unusual complications existed which rendered it reasonable and proper that professional advice should be called in to extricate or alleviate the affairs of the assigned estate from some unanticipated complications. (*Id.*)
3. An assignee will not be allowed, at the expense of the estate, to

retain a lawyer, as one among other employes that he may necessarily employ, for the purpose of affording him general advice as to his conduct in his office as trustee. The special exigency and reasonable necessity for the incurring of any such expense in the execution of the trust, must, in all cases, be shown. (*Id.*)

4. Preparing the inventory of the property and the schedules of the debtors and creditors, the advertising, attending the auction sale, &c., are services which the assignee is bound to render himself, and if he employs an attorney to perform the services an allowance will not be made to the attorney out of the estate. (*Id.*)
5. In this case there was allowed for preparing the order, &c., to advertise for creditors, ten dollars; for the citation for creditors to appear and prove their claims, twenty-five dollars, and for the papers requisite on the final accounting and the decree of discharge, twenty-five dollars. (*Id.*)
6. No allowance can be made for the legal services by a lawyer upon an accounting, except where claims are litigated; but where, as in this case, the claims are simply submitted with the vouchers of the expenditures, all that is requisite upon the accounting must be done by the assignee and the referee, who, in such a proceeding, discharges the duty simply of an accountant in the examination of the accounts, with the right to take proof and try the question where claims are disputed, and the investigation assumes more or less of a trial. (*Id.*)

ATTACHMENT.

1. Under the new Code, as before, the decision of a district court justice upon motion to vacate an attachment which had been pre-

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viously issued in the action may be reviewed on appeal. (*Lang agt Marks, ante, 127.*)

2. The Code has made no change in the manner of granting an attachment in a district court, and the attachment must be allowed by the justice and signed by the clerk. (*Id.*)

3. This action was commenced in June, 1879, against the trustees of the McKillup & Sprague Company, on the ground of statutory liability for failure to file annual report, and judgment was recovered after trial in March, 1882. On December 8, 1879, a warrant of attachment was issued against the property of the defendant Sprague and levy made upon the same. On the 21st of March, 1882, after judgment as above, and execution had been issued and levy made upon the same property, the defendant moved to vacate the attachment on the ground of irregularity. The motion was denied by Mr. Justice LAWRENCE, "upon the ground that judgment has been entered and execution has been issued."

Held, that under section 682 of the Code of Civil Procedure, the motion to vacate may be made "at any time before the actual application of the attached property or the proceeds thereof," &c.; that this motion was made in time and must be heard now on its merits. (*Parsons agt. Sprague, ante, 151.*)

4. Where a creditor who obtains an attachment against the property of defendant moves to vacate a prior attachment in another action against the defendant, the plaintiff in the process attacked has a right to claim that legal evidence of the existence of the subsequent lien shall be furnished before he can be called upon to justify his own proceedings (*Tim agt. Smith, ante, 199.*)

5. Affidavits that about a week after

defendant's goods, amounting to about \$250, were delivered to the defendant, he made a general assignment for the benefit of his creditors, with \$10,000 of preferences, and that plaintiff's goods, which were adapted to defendant's business, could not be discovered in his store, are insufficient upon which to grant an attachment when the assignment was assailed by no fact indicating it to have been in any respect inconsistent with the legal rights of defendant's creditors, and no probably fraudulent disposition of the goods was shown. (*Wilmerding agt. Cunningham, ante, 344.*)

6. A statement in an affidavit that other affidavits had been made and were on file in the office of the clerk, from which it appeared that defendant had purchased goods which had in like manner disappeared, did not strengthen plaintiff's case in the absence of extracts from these affidavits containing a statement of the facts referred to. (*Id.*)

7. Where a subsequent attaching creditor seeks to vacate a prior attachment upon the property of the insolvent debtor, there must be proof of a subsequent valid levy upon the same property covered by the prior attachment, and the affidavit of the attorney for the moving creditor that an attachment against the property of the defendant was granted in his client's suit and the warrant was duly issued to the sheriff, who had by virtue thereof attached the property of the defendant, and that the said attachment was in force and the action pending, is not sufficient for that purpose. (*Sine agt. Smith, ante, 353.*)

8. It appeared that after the prior attachments were issued, and apparently before the attachment of the moving creditor, an agreement in writing was entered into between the plaintiffs in the prior

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attachments and the assignee of the insolvent debtor, by which the said plaintiffs impliedly abandoned any attempt to perfect a levy upon the property of the debtor, in consideration of an agreement by the assignee to hold a certain sum in his hands and to pay it over to the plaintiffs in the prior attachment suits in case they eventually obtained judgment in said suits; and the sheriff made affidavit alleging not only that he had not levied upon or acquired a lien upon any property by virtue of said attachments, but that he had never been able to discover property of the defendant in such attachments liable to be levied upon:

Held, that as it is thus conclusively shown that neither the prior or subsequent attaching creditor has any lien upon any property belonging to the debtor, and the moving creditor has no legal interest in the question as to the validity of said prior attachments, he has not brought himself within the requirements of the Code entitling him to move to vacate them. (*Id.*)

9. Where an attachment against a non-resident debtor is served upon a third party, who, upon demand, gives a certificate as to property or moneys in his hands belonging to the debtor, such third party is not estopped from showing, in an action brought against him on the faith of such statement, that he was honestly mistaken in making it. (*Almy et al. agt. Thurber et al., ante, 481.*)

10. The doctrine of estoppel applies only to voluntary representations, declarations, admissions and acts, and has not been extended to declarations exacted by statute. (*Id.*)

11. Though there may be an abundant recapitulation of facts and circumstances in an affidavit, asserted on information and belief, to show that defendant had as-

signed and disposed of his property with intent to defraud his creditors, yet to permit the issuing of an attachment, the information must be authenticated by the person from whom it had been obtained. (*Wallach agt. Sippilli, ante, 501.*)

12. An affidavit showing that the person making it had called at the residence of the defendant and endeavored to secure an interview with him, which was refused under the asserted authority of the defendant, is not sufficient for the allowance of an attachment on the ground that defendant kept himself concealed to avoid the service of a summons. (*Id.*)

13. An attachment granted upon the affidavit of an agent of plaintiff, who alleged that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of deponent, was properly set aside upon application of a subsequent attaching creditor. (*Murray agt. Hankin, ante, 511.*)

14. The affidavit would have been sufficient if the allegation of the agent had been that the sum demanded was due over and above all counter-claims, discounts and set-offs existing in favor of the defendant to the knowledge of plaintiff (*DAVIS, P. J., dissenting. Id.*)

15. Where a party alleged to have property in his hands belonging to the defendant, which should be made the subject of attachment in the action makes, certificate to the sheriff that he has no property of defendant and owes no debt to him, an order for the examination of such party should not be granted on an affidavit on information and belief against the positive deposition of the person sought to be examined. (*Ives agt. Lockwood, ante, 518.*)

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16. The plaintiffs alleged, in an affidavit used upon an application for an attachment, that they had become the owners from the defendants of a lease of an oil well, and a derrick, carpenters' rig and other improvements upon the leasehold premises; that while they were such owners one Hotaling held a debt against the defendants for furnishing the derrick, &c., at the defendants' request, and had a lien therefor against the property; that he was about to enforce the payment of the debt, and had placed an execution in the hands of the sheriff to procure a sale of the property; that in order to prevent a sale of the property the plaintiffs were compelled to and did pay to the sheriff the amount of the debt: *Held*, that the plaintiffs thereby became entitled to the debt and lien so held by Hotaling; that they thus acquired a cause of action for a breach of contract against the defendants; that in an action brought by them to recover damages for the aforesaid breach of contract, an attachment might be issued under section 635 of the Code of Civil Procedure. The affidavit stated that the amount of "plaintiff's claim in said action is \$313.75, and interest from the ninth of January, 1882, over and above all discounts and set-offs:" *Held*, that this was a substantial compliance with section 636 of the Code of Civil Procedure, requiring the affidavit to show that the plaintiff is entitled to recover a sum stated "over and above all counter-claims known to him." (*Alford agt. Cobb*, 28 Hun, 22.)
17. In December, 1867, one Martin Van Brunt died, leaving a will, by which he appointed his widow Mary his executrix. A contest having arisen as to the validity of the will, one Schell was, on December 1, 1868, appointed special administrator of the estate by the surrogate, and continued to act as such down to the time of this appeal. At the time of Van Brunt's death a judgment had been recovered against him by the Marine Bank of Chicago. After Van Brunt's death and in April, 1869, it was sought, in an action brought by one Hammond against the Marine Bank of Chicago, to attach the judgment recovered by it against Van Brunt, by serving a copy of the attachment upon his widow Mary, the executrix named in his will: *Held*, that she did not, under the circumstances of the case, represent the judgment debtor, and that the service of the notice of the attachment upon her was entirely without effect. (*Matter of Flandrow*, 28 Hun, 279.)
18. Where property capable of manual delivery has been levied upon by a sheriff under a warrant of attachment, the attaching creditor may maintain an action to have a prior assignment executed by the debtor and an execution issued upon judgments confessed by him declared fraudulent and void, and to have the priority of the lien acquired by him under the attachment established. (*Bates agt. Plonsky*, 28 Hun, 112.)
19. The plaintiffs, residents of the state of Massachusetts, brought this action to recover the amount unpaid upon certain promissory notes made by the defendant. Certain shares of stock owned by the defendant in the Hat Sweat Manufacturing Company were levied upon under an attachment issued herein, the papers being served by the sheriff upon the treasurer and secretary of the company, who resided in the city of New York. The company was incorporated under the laws of the state of Pennsylvania, but its office and factory were located in the city of New York, and its business was there carried on, two of its three directors being residents of that city: *Held*, that the company might be treated as

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though it were a domestic corporation, and that its stock might be here attached by a creditor of its owner. (*Plympton* agt. *Bigelow*, 29 *Hun*, 362.)

20. A person having under his control property belonging to one against whom an attachment had been issued, refused to deliver the same to the sheriff or to give him the certificate required by section 650 of the Code of Civil Procedure. Thereafter he was compelled by an order made upon the application of the sheriff to deliver the property to the latter: *Held*, that the sheriff's title thereto related back to the time when he made the demand for the property and certificate, and that such title had priority over the title of one claiming under an assignment made by the debtor between the time of such refusal to deliver and the time of the actual delivery of the property to the sheriff. (*Anthony* agt. *Wood*, 29 *Hun*, 239.)

21. Section 1241 of the Code of Civil Procedure, providing that a judgment may be enforced by attachment when it requires "the payment of money into court, or to an officer of the court," is not imperative, but discretionary, and the court will not grant an attachment to collect costs or alimony in divorce cases, when the party is unable to comply with the requirements of the judgment. *It seems*, that this section only applies where the judgment requires a deposit or payment of money, other than the costs given by a final judgment, to a party or his attorney. (*Noland* agt. *Noland*, 29 *Hun*, 630.)

22. Upon the application of the plaintiffs an attachment was issued against the property of the defendant upon an affidavit made by the plaintiff Smith, in which he stated that he was one of the plaintiffs comprising the firm of Smith & Wicks; that the defendant was

"indebted to the above named plaintiff in the sum of \$11,398.65 over and above any counter-claims or offsets, and that the grounds for the plaintiffs' claims are as follows, to wit: For goods, wares and merchandise sold and delivered to the amount of said sum of \$11,398.65; the whole amount whereof is now due and owing." It then alleged the non-residence of the defendant: *Held*, that the affidavit failed to show the existence of any indebtedness from the defendant to the plaintiffs, and that the attachment should be vacated upon the application of one who, subsequent to the issue thereof, acquired an interest in the property seized. (*Smith* agt. *Davis*, 29 *Hun*, 306.)

23. Section 8331 of the Code of Civil Procedure providing that where an officer had commenced the performance of a service for which a fee was allowed by the statutes theretofore in force, he is entitled to the fee so allowed, not to the fee allowed by said Code, applies to the services of a sheriff on attachment. (*Woodruff* agt. *Imperial F. Ins. Co.*, 90 *N. Y.*, 521.)

24. Where, therefore, an attachment had been issued to a sheriff, and he had levied upon property, by virtue thereof prior to the enactment of said Code: *Held*, that the sheriff was entitled only to the compensation provided for by the Code of Procedure (Sec. 243). (*Id.*)

25. The requirement, however, of the Code of Procedure that such compensation shall be fixed "by the officer issuing the attachment," was dispensed with as to the city of New York by the provisions of the Code of Civil Procedure (sec. 26), authorizing the continuance of proceedings commenced in that city "before a judge out of court in an action * * * in a court of record" by another judge of the same court. (*Id.*)

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26. The affidavits upon application of a sheriff for compensation for services under an attachment averred that he levied upon and attached a United States bond, sufficient to satisfy plaintiff's claim, and that thereafter defendant paid and settled said claim: *Held*, that enough was shown to make out a *prima facie* case on the part of the sheriff, from which, in the absence of evidence to the contrary, the court might infer that he did take possession, and so was entitled to compensation for his trouble and expense under said provision of the Code of Procedure. (*Id.*)

27. The amount of such compensation being within the discretion of the court below, its order is not reviewable here. (*Id.*)

28. The plaintiff in the attachment suit objected to any allowance on the ground that he was not liable for the compensation of the sheriff, as the latter should have looked to the lien he had upon the property attached and required payment from the defendant before surrendering (*Code of Civil Procedure, sec. 3843, subd. 12, 700*): *Held*, that this question did not arise on appeal, as the order appealed from only fixed the amount the sheriff was entitled to, and did not determine who was liable therefor. (*Id.*)

29. Where, within thirty days after the granting of an attachment, the defendant, against whom it was issued, appeared generally in the action:

Held, that this was equivalent to a personal service of the summons, and met the requirement of the provision of the Code of Civil Procedure (*sec. 688*), that the summons shall be served within thirty days after granting of the attachment; that said provision must be read with the provision (*sec. 424*), making a voluntary general appearance "equivalent to personal service of the summons." (*Catlin agt. Ricketts, 91 N. Y., 668.*)

30. An appeal does not lie to this court from an order vacating an attachment, unless it appears in the order appealed from that the attachment was set aside for want of power to grant it, or upon some ground involving jurisdiction of the court. (*Id.*)

ATTORNEYS.

1. A conviction of an attorney of felony forfeits his right to act as such. If stricken from the roll, a pardon by the governor will not entitle him to restoration. The court will, however, examine the proofs of alleged innocence in determining whether or not he ought to be restored. In the present case the court held the presumption arising from a conviction was not overcome, and refused restoration. (*Matter of E., ante, 171.*)

2. In an action by wife for a separation from her husband for cruel and inhuman treatment, after issue had been joined the wife returned to live with her husband, and the plaintiff's attorney, in the name and behalf of the wife, made a motion for an order compelling the defendant to pay the attorney for plaintiff a counsel fee for his services in the action:

Held, that the attorney had mistaken his remedy. Before the settlement can be set aside or treated as fraudulent, some good reason therefor must be shown, and the plaintiff herself is entitled to notice of any application for such purpose:

Held, further, that if the attorney as such has any claim for counsel fees or costs upon the defendant, he must, in his own behalf, notice his motion or bring his action to enforce such claim. (*Chase agt. Chase, ante, 306.*)

3. When no costs are asked for in the notice of motion none should be allowed. (*Id.*)

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4. An attorney for a wife, in an action against her husband, can, by order of the court in the action after settlement by the parties, compel the husband to pay him for services rendered to the wife up to the time of such settlement. (*Chase* agt. *Chase*, ante, 308.)
 5. Where a court has jurisdiction of the subject-matter of the action and of the person, and the papers presented by the attorney are regular upon their face, and the court after consideration, and after hearing and acting judicially upon the papers, grants the application, and the same is afterwards set aside and vacated upon the ground of error in the court, such error of the court is not only a protection to the attorney, but to every other person for acts done under such erroneous process, and the attorney is not liable therefor. (*Fischer* agt. *Langbein*, ante, 382)
 6. Under section 1294 of the Code, an attorney, though not a party to the action, can appeal from an order refusing his fees. (*Louden* agt. *Louden*, ante, 411.)
 7. An allowance may be made to counsel upon the discontinuance of a divorce case, under section 1769 of the Code (*See Chase* agt. *Chase*, ante, 308). (*Id.*)
- See Costa.*
Lachenmeyer agt. *Lachenmeyer*, ante, 422.
8. An assignment by the plaintiff in an action, with the knowledge of his attorney, of a judgment in his favor, revokes the authority of said attorney, and he has no power or authority thereafter to act for or bind the assignee. (*Robinson* agt. *Brennan*, 90 N. Y., 208.)
 9. A sheriff to whom an execution upon the judgment has been issued, after notice of the assignment may not take his instructions from plaintiff's attorney, but must obey his execution and conform to the rules of law in regard thereto, except as otherwise instructed by the assignee. (*Id.*)
 10. An alien may not be admitted to practice as an attorney and counselor-at-law in this State. (*In re O'Neill*, 90 N. Y., 584.)
 11. The provision of the rule of the court of appeals (*Rule 7, as amended in 1880*), authorizing the admission of persons who have practiced three years in the highest courts of law of another country, applies only to the case of a citizen of the United States who has thus practiced. (*Id.*)
 12. *It seems*, that the legislature has power under the Constitution to authorize the admission of persons not citizens of the state (*Art. 6, as amended in 1871.*) (*Id.*)

ATTORNEY AND CLIENT.

1. Upon application of a receiver, appointed in supplementary proceedings, to be substituted as plaintiff in certain actions pending, brought by M., the judgment debtor, notice of which application was served upon the attorney for M., an order was made granting the application upon the condition that the judgment creditor should pay to said attorney, in satisfaction of his lien for his fees and charges, a sum which had been agreed upon between him and the attorney for the judgment creditor. This agreement was made without notice to or knowledge of the judgment debtor. The condition was complied with and the substitution made. Subsequently, upon motion in one of the actions wherein the receiver was thus substituted, in which action a judgment in favor of the plaintiff had been rendered, and upon its appearing that the defendant therein had purchased the judgment in the action in

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which the receiver was appointed, the receiver was required to allow, in satisfaction of his judgment, the amount so paid to the attorney on such substitution: *Held*, error; that the order fixing the compensation of the attorney was not binding upon his client; that the amount due the attorney could not be determined, except in a direct proceeding between him and his client, of which the latter had notice. (*Goddard* agt. *Stiles*, 90 N. Y., 199.)

ATTORNEY'S LIEN.

1. Where a plaintiff, without paying the fees of his attorney, before there has been any verdict, report, decision or judgment in plaintiff's favor, effects a settlement with the defendant, the attorney cannot maintain an action against his client and the defendant in the original suit on the ground that by the settlement "his lien upon the cause of action" had been destroyed. (*Tullis* agt. *Bushnell*, ante, 465.)
2. He must take the same steps and establish his lien by the continuance of the action, notwithstanding the settlement, as before the adoption of the sixty-sixth section of the Code, except that he is not, under that section, required to show that the settlement was a fraud upon him; and the leave to prosecute the action should be granted if the settlement inequitably affected his lien upon the cause of action. (*Id.*)

BAIL.

1. The court cannot set aside an allowance of bail made upon regular notice, on account of excusable neglect of plaintiff's attorney to attend at the justification. (*Lewis* agt. *Stevens*, ante, 525.)

2. When a sheriff has once been legally discharged from his liability as bail, he cannot be reinstated therein (*Reversing S. C.*, 48 N. Y. Superior Ct. R., 559). (*Id.*)

BANKRUPTCY.

1. A judgment against a bankrupt will not be discharged under section 1268 of the Code of Civil Procedure where it appears by affidavit that the judgment was recovered not against defendant alone, but jointly with another and is not the judgment covered by the discharge of the bankrupt, and that plaintiff had no knowledge, actual or constructive, of the bankruptcy proceedings, that he was not named in the proceedings as a creditor and that the omission of the name of plaintiff as a creditor and the substitution of a similar name was with fraudulent intent. (*Seaman* agt. *McReynolds*, ante, 521.)

BICYCLES.

1. An ordinance enacted by the commissioners of Central Park "no bicycle or tricycle be allowed in Central or city parks," is within the discretionary power of the commissioners, and it cannot be held, as matter of fact or law, to be unreasonable. (*Matter of Wright*, ante, 119.)

BURDEN OF PROOF.

1. A misdirection by the court upon the question of the burden of proof, upon the trial by jury of specific questions of fact in an action triable by the court, may "in the discretion of the court which reviews it, be disregarded, if it is of opinion, that substantial justice does not require that a new trial should be granted,"

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(*Code of Civil Procedure, sec. 1003*).
(*Post agt. Mason, 91 N. Y., 539.*)

2. *It seems*, that upon the trial of an indictment for an assault with a deadly weapon, the assault being proved, the burden is upon the accused to establish the existence of sufficient cause to justify the use of such a weapon. (*Saucyer agt. People, 91 N. Y., 667.*)

CALENDAR.

1. When a preference is claimed on the calendar of this court under the provision of the Code of Civil Procedure (*sec. 791, subd. 7*), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or a judge thereof upon notice to the adverse party" (*Sec. 793. B'k of Attica agt. Met. Nat. B'k., 91 N. Y., 239.*)

CENTRAL PARK.

1. An ordinance enacted by the commissioners of Central Park that "no bicycle or tricycle be allowed in Central or city parks," is within the discretionary power of the commissioners, and it cannot be held as matter of fact or law, to be unreasonable. (*Matter of Wright, ante, 119.*)

CERTIORARI.

1. The canal appraisers having denied a claim for damages made by the relator, on the ground that not having been filed within the

time prescribed, it was barred by the statute, an appeal was taken by him to the canal board, as authorized by chapter 308 of 1829. Two days after such appeal was taken, a writ of *certiorari* to review the action of the canal appraisers was procured: *Held*, that in any event the writ could not issue while the appeal taken by the relator was pending and undecided. (*People ex rel. Benedict agt. Dennison, 28 Hun, 828.*)

2. That under subdivision 2 of section 2122 of the Code of Civil Procedure, the writ could not issue in any case, as the determination of the canal appraisers could be adequately reviewed by the appeal given by the act of 1829. (*Id.*)
3. *Semble*, that as the relator sought to recover damages from the state, caused by the use of his property for public purposes, it might well be doubted whether the damages could be recovered in any other way than that provided by the legislature; that is, by the action of the canal appraisers, as modified by an appeal to the canal board, the decision of which is declared to be final. (*Id.*)
4. In reviewing upon a *certiorari* the decision of the canal board, made upon an appeal from a decision of the canal appraisers, the court can only inquire whether those bodies have kept within the limits of the jurisdiction given them by law. It cannot consider the merits of any alleged irregularities, not jurisdictional, occurring in the proceedings. (*People ex rel. Peck agt. Canal Board, 29 Hun, 159.*)
5. The addition of the words "appeal dismissed" to a decision of the canal board affirming a decision of the canal appraisers, does not destroy or impair the right of the claimant to apply for a rehearing under the law. (*Id.*)

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CHINESE LABORERS.

1. Under the anti-Chinese act, forbidding the coming of Chinese laborers to the United States (*act of congress of May 6, 1882*), a Chinese seaman is a "laborer" and prohibited from leaving his vessel to come ashore even for temporary purposes. (*Matter of Fook, ante, 404.*)

CLOUD UPON TITLE.

1. When property has been sold for the non-payment of an assessment and a certificate given, which, if followed by deed, will confer a *prima facie* title, the owner can maintain an action to set aside the sale and enjoin the deed for the illegality of the assessment, because in such a case there is a cloud upon his title, which evidence alone will remove. (*New York, Ontario and Western Railway Co. agt. Davenport, ante, 484.*)
2. The deed when given will be conclusive evidence of the regularity of the sale, and presumptive evidence that all previous proceedings were regular. (*Id.*)
3. This action affects the title to real estate of the subject-matter of which this court has jurisdiction; this court can by action remove a cloud upon title, when extrinsic evidence must be resorted to, and it follows that the statute, which gives to the comptroller power to cancel such sales, and which the complaint expressly avers he does not intend to exercise, but that, on the contrary, "*he intends to execute such deed,*" cannot possibly deprive this court of its well established jurisdiction. (*Id.*)
4. A complaint which seeks to remove a cloud upon title to real estate, which not only avers the giving of a certificate of sale by the comptroller, but also contains

the express averment that the comptroller intends to execute such deed is good on demurrer. (*Id.*)

CODE OF PROCEDURE.

1. Section 27 — This section of the Code of Civil Procedure, providing that where an officer had commenced the performance of a service for which a fee was allowed by the statutes theretofore in force, he is entitled to the fee so allowed, not to the fee allowed by said Code, applies to the services of a sheriff on attachment. Where, therefore, an attachment had been issued to a sheriff, and he had levied upon property by virtue thereof prior to the enactment of said Code: *Held*, that the sheriff was entitled only to the compensation provided for by the Code of Civil Procedure (*Sec. 243*). The requirement, however, of this section of the Code of Procedure, that such compensation shall be fixed "by the officer issuing the attachment," was dispensed with, as to the city of New York, by the provisions of the Code of Civil Procedure authorizing the continuance of proceedings commenced in that city "before a judge out of court in an action * * * in a court of record" by another judge of the same court. (*Woodruff agt. Imperial Fire Insurance Company, 90 N. Y., 521.*)
2. Section 64 — Under the provisions of the Code of Procedure (*subd. 15, sec. 64*), as amended in 1860,* authorizing the defendant in an action in a justice's court, to make an offer of judgment "on the return of process and before answering," and upon acceptance thereof by plaintiff authorizing the justice to render judgment accordingly, the words "on the return of process" do not limit the authority to the return day specified in

* See Code Civ. Pro., 246.

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the process, but it may be exercised immediately after service and actual return thereof. Where, therefore, upon the same day of the issuing of a summons by a justice of the peace, but after its service and actual return by the constable with proper certificate of service, the parties appeared by attorneys who duly swore to their authority to so appear, and plaintiff's attorney filed his complaint in writing, whereupon defendant's attorney made an offer in writing to allow judgment for the amount claimed in the complaint, which was accepted and judgment entered accordingly: *Held*, that the judgment was valid; also, *held*, that authority to defendant's attorney to appear for her empowered him to make the offer of judgment, and that, therefore, it was not necessary, in addition to swearing to authority to appear generally, that he should have sworn to authority to make the offer. (*Fowler et al. agt. Haynes*, 91 N. Y., 346.)

3. Section 148—An objection as to parties must be taken by answer or demurrer. (*Farwell et al. agt. Importers, etc., National Bank*, 90 N. Y., 483.)

4. Section 298—Supplementary proceedings—appointment of a receiver—where the order must be filed. (*See Fredericks agt. Niver*, 28 Hun, 417.)

5. Section 302—Imprisonment of a fraudulent debtor—application for his discharge—when it should be granted. (*See Russak agt. Sabey* 29 Hun, 491.)

6. Section 809—The repeal by the act of 1880 (*chap. 245, Laws of 1880*) of the act of 1870 (*chap. 859, Laws of 1870*) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by

the former act in proceedings pending before him at the time the repealing act took effect. In proceedings so pending: *Held*, that the surrogate could not exceed the maximum amount limited by this section of the Code of Procedure; also that, although the costs were taxed after the Code of Civil Procedure took effect, they were not affected by its provisions, as by it (*sec. 3847, subd. 11*) the provisions of the chapter (18), in reference to surrogates' courts, are with certain exceptions, not affecting the question, only made applicable to an action or special proceeding commenced after September 1, 1880. (*Matter of Weston*, 91 N. Y., 503.)

CODE OF CIVIL PROCEDURE.

1. Section 26—This section of the Code of Civil Procedure providing that where an officer had commenced the performance of a service for which a fee was allowed by the statute theretofore in force, he is entitled to the fee so allowed, not to the fee allowed by said Code, applies to the services of a sheriff on attachment. The requirements, however, of this section of the Code of Procedure that such compensation shall be fixed "by the officer issuing the attachment," was dispensed with as to the city of New York by the provisions of the Code of Civil Procedure authorizing the continuance of proceedings commenced in that city "before a judge out of court in an action * * * in a court of record" by another judge of the same court. (*Woodruff agt. Imperial Fire Ins. Co.*, 90 N. Y., 521.)

2. Section 37—Special term—adjournment of, to chambers of the justice—contested motions cannot be brought on at the term held at chambers, except by consent. (*See Matter of Wadley*, 29 Hun, 12.)

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3. Section 66 — Where a plaintiff, without paying the fees of his attorney, before there has been any verdict, report, decision or judgment in plaintiff's favor, effects a settlement with the defendant, the attorney cannot maintain an action against his client and the defendant in the original suit on the ground that by the settlement "his lien upon the cause of action" had been destroyed. He must take the same steps and establish his lien by the continuance of the action, notwithstanding the settlement, as before the adoption of this section of the Code, except that he is not, under that section, required to show that the settlement was a fraud upon him; and the leave to prosecute the action should be granted if the settlement inequitably affected his lien upon the cause of action. (*Tullis* agt. *Bushnell*, ante, 465.)
4. Section 190, sub. 2 — A temporary injunction is unauthorized when it does not appear from the complaint that plaintiff is entitled to the final relief for which the action is brought. The granting of the injunction in such case is error of law which may be reviewed in this court on appeal. (*McHenry* agt. *Jewett*, 90 N. Y., 58.)
5. Section 190, sub. 3 — A proceeding to punish for an alleged criminal contempt, originating in the violation of an order granted in a civil action, is a civil special proceeding within the meaning of the Code of Civil Procedure (*secs.* 1356, 1357), and an order therein finding the party proceeded against guilty and imposing a punishment, is reviewable here upon appeal. As to whether an appeal is proper from an order punishing a disobedience of an order of a criminal court in a criminal action, *quære*. (*People ex rel. Negus* agt. *Dwyer*, 90 N. Y., 402.)
6. Section 239 — Special term — adjournment of, to chambers of the justice — contested motions cannot be brought on at the term held at chambers, except by consent. (*See Matter of Wadley*, 29 Hun, 12.)
7. Section 284 — Under this section of the Code of Procedure, an execution issued after the lapse of five years from the entry of judgment, without leave of the court, is irregular, and should be vacated. The law supposes the judgment to be unpaid for five years. After that time it presumes payment, and requires the plaintiff to show by proof that the judgment, either in whole or in part, is still unpaid. (*Van Voorhis* agt. *Kelly et al.*, ante, 300.)
8. Sections 382, 383 — Statute of limitations — when an action for a personal injury is founded on negligence. (*See Dickinson* agt. *Mayor*, 28 Hun, 254.)
9. Section 372 — Where an affidavit for the examination of a defendant before trial details the circumstances as to which proof will be required, which it is expected the defendant will be able to give in such a manner as to establish to a reasonable certainty its materiality, followed by an expression of belief that the examination and testimony of the defendant relative to the issues are both material and necessary to the plaintiff for the prosecution of the action, the requirements of the fourth subdivision of section 372 of the Code are sufficiently complied with. (*Fogg* agt. *Fisk*, ante, 351.)
10. Section 395 — Statute of limitations — what is a sufficient acknowledgment to take the debt out of the statute. (*See Anderson* agt. *Sibley*, 28 Hun, 16.)
11. Section 410 — Statute of limitations — when the statute begins to run on a claim against the city

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- of New York. (*See Dickinson agt. Mayor*, 28 Hun, 254.)
12. Section 413 — Statute of limitations — what statements do not amount to a plea of statute of limitations. (*See Budd agt. Walker*, 29 Hun, 344.)
13. Sections 416, 638, 728, 8165 — An error in a summons as to the time within which the defendant must appear and answer does not render the process void. It constitutes a mere irregularity capable of amendment *nunc pro tunc*. When the statute requires service of process to be made out of the state or by publication within thirty days, and the thirtieth day occurs upon Sunday, a service made or publication commenced on the thirty-first day is a compliance with the statute. (*Gibson et al. agt. Freel*, ante, 2.8.)
14. Sections 424, 638 — Where within thirty days after the granting of an attachment the defendant, against whom it was issued, appeared generally in the action: *Held*, that this was equivalent to a personal service of the summons, and met the requirement of the provision of the Code of Civil Procedure (sec. 638), that the summons shall be served within thirty days after granting of the attachment; that said provision must be read with the provision (sec. 424), making a voluntary general appearance "equivalent to personal service of the summons." (*Catlin agt. Ricketts*, 91 N. Y., 668.)
15. Sections 450, 553 — The reason of the common-law rule in regard to the joinder of the husband with the wife has wholly ceased to exist; and the rule itself has been abrogated in all cases, of torts as well as contracts, affecting the separate property of a married woman, or connected with or arising from the management or control of her business; and the exemption of a married woman from arrest, which sprang solely from the reason of the rule, has ceased in all cases in which the law expressly authorizes the arrest of females in general terms. (*Muser agt. Miller*, ante, 288.)
16. Section 501 — In an action upon a lease under seal of rooms for an office, to recover rent accruing for the last half year of the term, the complaint alleged an occupation by the defendant during the whole term. The answer did not deny this, but set up as a counter-claim that the lessor permitted the rooms above those leased to defendant to be used and occupied by persons who carried on a noisy mechanical business, using printing presses, and also weights which were thrown down upon the floor, causing great noise, and thereby interfering with defendant's use and occupation of his rooms, and preventing him from carrying on his professional business therein; that defendant, by reason thereof, was compelled on divers occasions to leave his rooms, and that thereby the ceilings were broken and water leaked through, damaging his books and furniture: *Held*, that a demurrer to the answer was properly sustained; that, conceding the facts stated constituted a cause of action against plaintiff, they did not constitute a counter-claim under this section of the Code of Civil Procedure. (*Boreel agt. Lawton*, 90 N. Y., 293.)
17. Section 521 — This action was brought to set aside, as having been obtained by fraud, a transfer by plaintiff to his partner, defendant D., of the interest of the former in the copartnership property and in certain real estate claimed by him to have been such property, and to set aside a general assignment for the benefit of creditors of the property subsequently made by D. to defendant W. The other defendants, judgment creditors of the firm, were made par-

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ties, to have their judgments declared to be a lien upon the real estate. D. answered, denying the fraud or that the real estate was copartnership property. W. answered, denying the complaint. The judgment creditors answered, admitting the complaint, asking that the transfers be declared fraudulent and void, and that a receiver of the property be appointed. No copy of this answer was served upon the attorneys for D. or W. D. died, and without a revival of the action against his representatives, the attorney for the judgment creditors, having served notice of trial on the attorney for plaintiff alone, brought the case to trial and obtained judgment by default against W., declaring the assignment void and directing payment of their claims, by a receiver who had been appointed, out of funds arising from the sale of the real estate. The cause was not noticed by plaintiff or the other defendants: *Held*, that a motion on the part of W. to set aside the judgment was improperly denied; that the judgment creditors were not in position to take judgment against their co-defendant without having served upon him a copy of their answer, as required by the Code of Civil Procedure, and also a notice of trial; that no waiver of the objection that answer had not been served could be presumed, as the judgment was by default and without notice; also, that D. was a necessary party and the action could not legally proceed without being revived against his representatives. (*Edwards* agt. *Woodruff et al.*, 90 N. Y., 398.)

18. Section 522 — In an action on a promissory note for \$1,000, payable to the order of defendant, and indorsed by him, the complaint, after setting forth the note, alleged that it was indorsed to plaintiffs, before maturity, by defendant, in payment of an indebtedness of about \$1,000 for goods

theretofore purchased by him. The answer did not deny any of the allegations of the complaint; it alleged that the note was made for defendant's accommodation, and was indorsed to plaintiffs upon a usurious agreement, whereby they were to give him for the note \$941.92, and a credit for thirty-five dollars and eighty-three cents more, thus taking seven dollars and ten cents more than lawful interest. The answer demanded a dismissal of the complaint, with costs and disbursements: *Held*, that the answer did not put the averments of the complaint in issue, and as, by the Code of Civil Procedure, "each material allegation of the complaint not controverted by the answer * * * must, for the purposes of the action, be taken as true," defendant was not at liberty to deny the existence of the facts constituting the cause of action stated in the complaint, or to prove any state of facts inconsistent therewith; that the omission to deny was equivalent to a formal admission of the truth of the averments and was conclusive as such. (*Fleischmann et al.* agt. *Stern*, 90 N. Y., 110.)

19. Sections 549, 550 — Execution against the person — in what cases it may issue, when no order of arrest has been previously granted. (*See Aetna Ins. Co.* agt. *Shuler*, 28 Hun, 338.)

20. Section 550, sub. 2 — Fraudulent disposition of his property by a debtor, with intent to defraud his creditors — it avoids a credit upon which goods were previously or subsequently sold to him. (*See Arnold* agt. *Shapiro*, 29 Hun, 478.)

21. Sections 580, 581 — The court cannot set aside an allowance of bail made upon regular notice, on account of excusable neglect of plaintiff's attorney to attend at the

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justification. When a sheriff has once been legally discharged from his liability as bail, he cannot be reinstated therein (*Reversing S. C.*, 48 *N. Y. Superior R.*, 559). (*Lewis* agt. *Stevens*, ante, 525.)

22. Section 603 — A temporary injunction is unauthorized when it does not appear from the complaint that plaintiff is entitled to the final relief for which the action is brought. (*McHenry* agt. *Jewett*, 90 *N. Y.*, 58.)

23. Section 606 — Power of a county judge to grant an injunction. (*The People ex rel. Negus* agt. *Dwyer*, 90 *N. Y.*, 402.)

24. Sections 608, 1638 — Where, in an action brought under section 1638 of the Code of Civil Procedure to compel the determination of a claim to the property adverse to that of the plaintiff, it appeared that the defendant was actively interfering with the possession by plaintiff of the premises in controversy an injunction may be issued under section 608, and that immediately following it. (*Stamm* agt. *Bostwick*, ante, 358.)

25. Section 629 — It is a condition precedent to the right of a judge to act under the amendment of 1883 to this section of the Code of Civil Procedure, that he should be satisfied that the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money. Affidavits which are but expressions of opinion not furnishing the court with any facts upon which it can determine for itself whether the alleged wrong or injury is not irreparable, and whether it "is capable of being adequately compensated for in damages," are insufficient. The fair and reasonable interpretation of the amendment to this section of the Code is, that the application for the vacation of the injunction should be

made to the court or judge who hears the application to vacate or modify the injunction order. Did the legislature intend that the injunction should be vacated where the court, after hearing both parties, had determined that the alleged agreement, the execution of which the injunction was designed to restrain, is absolutely null and void? *Quære.* (*Metropolitan Elevated Railroad Co.* agt. *Manhattan Railway Co.*, ante, 277.)

26. Section 629 — Upon an application to vacate the injunction restraining the carrying out of the "merger agreement" upon filing the undertaking provided for under the new amendment of this section of the Code of Civil Procedure:

Held, first, that as the defendants were required by the order served upon them to show cause why the injunction therein granted provisionally or *ad interim* should not be continued during the pendency of the action, and as they appeared upon the return day of this order and opposed the application, their so appearing and opposing must, within the meaning of the provision of the recent amendment to this section, be regarded as having the same force and effect as if they had applied upon notice to vacate the injunction.

Second. As the motion of the plaintiff to continue the *ad interim* injunction until the trial and judgment is, though argued, still under consideration, the application of the defendants now to vacate the injunction upon filing the undertaking provided for by the statute is, within the meaning of the new amendment, an application "upon the hearing."

Third. The alleged wrong and injury complained of is capable of being adequately compensated for in money, as it is the withholding from the Metropolitan road of the quarterly payments provided for in the original lease made by

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the directors, with the approval of the stockholders, and consists in the difference between the amount payable quarterly under that lease and the reduced amount payable quarterly under the October agreements, which reduced amounts the Manhattan Company have so far offered to pay. The extent, therefore, of the injury which the plaintiffs can sustain by vacating the injunction is the amount of that difference from the time of the service of the injunction until the action can be tried and the rights of the parties finally determined by a judgment.

Fourth. An undertaking, therefore, sufficient to cover the amount of this difference from the service of the injunction to the first of January next, which difference it is agreed would amount to \$196,000, is the proper measure of the plaintiffs' loss up to that period, and sufficient within the provisions of the new amendment to secure to the plaintiffs adequate compensation in money for any injury they may sustain by the vacating the injunction.

The amendment makes no distinction between injunctions *ad interim* and injunctions *pendente lite*. When the indemnity contemplated by the statute is given it puts an end alike to the injunction *ad interim* and to the motion to continue it while pending and undecided (*See, also, Metropolitan Elevated Railway Company agt. The Manhattan Railway Company, opinion by LAWRENCE, J., ante, 277. (Metropolitan Elevated Railroad Co. agt. Manhattan Railway Co., ante, 319.)*)

27. Section 629 — The court has power, notwithstanding the pendency of the appeals in the court of appeals, to vacate the injunction orders upon defendants executing undertakings as provided by this new amendment of this section of the Code of Civil Procedure, if proper and sufficient grounds are presented.

But when, as in these cases, the general term has decided that the distribution, without consideration, of a large amount of stock was in violation of positive law, and consequently the payment of dividends on such stock would be illegal, and that plaintiffs have a sufficient standing in court to call for the enforcement of the law, they do not fall within the class of actions contemplated by the amendment.

No court has any right or power, upon an offer by a corporation to indemnify a few individuals against pecuniary loss, to grant in effect permission to such corporation to continue to violate the law of the land (*See, also, Metropolitan Elevated Railway agt. The Manhattan Railway Company, ante, 277; and Metropolitan Elevated Railroad Company agt. The Manhattan Railway Company and The New York Elevated Railroad Company and others, ante, 319. (Williams agt. Western Union Telegraph Company, ante, 326.)*)

28. Sections 635, 636 — Attachment — when the action is for a breach of contract, it is sufficient to show that the sum is claimed to be due over and above all discounts and set-offs. (*See Alford agt. Cobb, 28 Hun, 22.*)

29. Section 635 — Attachment — what statement of the amount due is sufficient — an action upon a note and to foreclose securities held as collateral thereto, is an action for money only. (*See Hamilton agt. Penney, 29 Hun, 265.*)

30. Sections 644, 647, 649, sub. 3 — Attachment — when the stock of a foreign corporation having its place of business in this state is subject to it. (*See Plimpton agt. Bigelow, 29 Hun, 362.*)

31. Sections 650, 651, 655, 667 — Where an attachment against a non-resident debtor is served upon a third party, who, upon demand,

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gives a certificate as to property or moneys in his hands belonging to the debtor, such third party is not estopped from showing, in an action brought against him on the faith of such statement, that he was honestly mistaken in making it.

The doctrine of estoppel applies only to voluntary representations, declarations, admissions and acts, and has not been extended to declarations exacted by statute. (*Almy et al. agt. Thurber et al., ante*, 482.)

32. Section 650 — Attachment — refusal to deliver property to the sheriff — the title of the sheriff, when the property is acquired, relates back to the time when he demanded the property. (*See Anthony agt. Wood*, 29 Hun, 289)

33. Section 682 — This action was commenced in June, 1879, against the trustees of the McKillup & Sprague Company, on the ground of statutory liability for failure to file annual report, and judgment was recovered after trial in March, 1882. On December 8, 1879, a warrant of attachment was issued against the property of the defendant Sprague and levy made upon the same. On the 21st of March, 1883, after judgment as above, and execution had been issued and levy made upon the same property, the defendant moved to vacate the attachment on the ground of irregularity. The motion was denied by Mr. justice LAWRENCE, "upon the ground that judgment has been entered and execution has been issued:"

Held, that under this section of the Code of Civil Procedure the motion to vacate may be made "at any time before the actual application of the attached property or the proceeds thereof," &c.; that this motion was made in time and must be heard now on its merits. (*Parsons agt. Sprague, ante*, 151.)

34. Section 682 — Where a subsequent attaching creditor seeks to vacate a prior attachment upon the property of the insolvent debtor, there must be proof of a subsequent valid levy upon the same property covered by the prior attachment, and the affidavit of the attorney for the moving creditor that an attachment against the property of the defendant was granted in his client's suit and the warrant was duly issued to the sheriff, who had by virtue thereof attached the property of the defendant, and that the said attachment was in force and the action pending, is not sufficient for that purpose.

It appeared that after the prior attachments were issued, and apparently before the attachment of the moving creditor, an agreement in writing was entered into between the plaintiffs in the prior attachments and the assignee of the insolvent debtor, by which the said plaintiffs impliedly abandoned any attempt to perfect a levy upon the property of the debtor, in consideration of an agreement by the assignee to hold a certain sum in his hands and to pay it over to the plaintiffs in the prior attachment suits in case they eventually obtained judgment in said suits; and the sheriff made affidavit alleging not only that he had not levied upon or acquired a lien upon any property by virtue of said attachments, but that he had never been able to discover property of the defendant in such attachments liable to be levied upon:

Held, that as it is thus conclusively shown that neither the prior or subsequent attaching creditor has any lien upon any property belonging to the debtor, and the moving creditor has no legal interest in the question as to the validity of said prior attachments, he has not brought himself within the requirements of the Code entitling him to move to vacate them. (*Sine agt. Smith, ante*, 353.)

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85. Section 709—Who liable for the compensation of the sheriff in an attachment suit when attachment is vacated. (*Woodruff* agt. *Imperial Fire Insurance Company*, 90 N. Y., 521.)

86. Section 718 — Receiver — the court may appoint one to receive rents and profits in a foreclosure action. (*See Hollenbeck* agt. *Donell*, 29 Hun, 94.)

87. Section 713 — Receiver of a firm may be appointed without notice to a non-resident partner. (*See Alford* agt. *Berkele*, 29 Hun, 633.)

88. Section 724 — An amendment of a notice of appeal from an order denying a motion for a new trial, so as to make it also a notice of appeal from a judgment, may not be granted after the time for appealing from the judgment has expired, as the effect of the amendment is to allow an appeal from the judgment, which the court has no power to do (*Code of Civil Pro.*, secs. 783, 784). Neither the provisions of the Code of Civil Procedure (sec. 1803) authorizing omissions to be supplied, or amendments to be made to perfect an appeal, nor the provision (sec. 724) allowing the court "to supply an omission in any proceedings," or to "permit an amendment thereof," apply to the case of such an amendment. *Mott* agt. *Lansing* (5 Lans., 516); *Bouton* agt. *Bouton* (40 How. Pr., 217); *S. C.* (42 Id., 11), distinguished. (*Lavalle* agt. *Skelly*, 90 N. Y., 546.)

89. Sections 755, 756 — Where the indorser of a note paid it after an action had been commenced thereon against the maker:

Held, that such payment inured to the benefit of the indorser of the note, but did not furnish the maker with a defense thereon. By the payment the indorser acquired a cause of action against the defendant, and might have asked a substitution as plaintiff here, but the

action did not abate, and, under the circumstances, was properly continued by the original plaintiff. (*Concord Granite Co.* agt. *French*, ante, 817.)

40. Section 757 — The provision of this section of the Code of Civil Procedure, as amended by chapter 542, Laws of 1879, providing for the continuance of an action "in case of the death of a sole plaintiff or a sole defendant," when the cause of action survives, applies to a case where a sole plaintiff and a sole defendant are both dead. (*Holsman* agt. *St. John*, 90 N. Y., 461.)

41. Section 769 — Motions — where they may be made. (*See Curtis* agt. *Greene*, 28 Hun, 294.)

42. Section 779 — Where supplementary proceedings were instituted upon return of an execution, and during the course of the proceeding ten dollars costs were allowed by the judge, and also the further sum of thirty dollars at the close of the examination, when a receiver was appointed:

Held, that the ten dollars allowed by the court are clearly motion costs and are collectible by execution.

Held, further, that, in supplementary proceedings the final costs cannot be deemed motion costs, and are not, therefore, collectible by execution. (*Valiente* agt. *Bryan*, ante, 203.)

43. Section 779 — The defendant in this action, by his wife for a limited divorce, moved to vacate an order of arrest upon which he had been held. An order denying the motion was affirmed by the general term, and an appeal to the court of appeals was dismissed, with costs. The remittitur upon the decision of the court of appeals was received by the attorney on June 22, 1882, and on the following day the plaintiff died. Judgment was entered on the remittitur

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and the costs and disbursements adjusted at \$117.77:

Held, that the costs belonged to the attorney who made the disbursements and rendered the services, and that leave to issue execution for their collection should have been granted, his right to receive them being in no manner dependent upon the continuance of the life of his client (BRADY, J., *dissents*). (*Lachenmeyer* agt. *Lachenmeyer*, ante, 422.)

44. Sections 791, 793 — When a preference is claimed on the calendar of this court under the provision of the Code of Civil Procedure (*sec. 791, subd. 7*), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or a judge thereof upon notice to the adverse party (*Sec. 793*)" (*Bank of Attica* agt. *Met. Nat. Bk.*, 91 N. Y. 239.)

45. Section 817—The supreme court has no power under this section of the Code of Civil Procedure to consolidate two actions for partition, where the subject of the one is land situate in one county, and of the other land in another county, and where one or more of the parties to the one are not parties to or interested in the subject of the other action. (*Mayor* agt. *Coffin et al.*, 90 N. Y., 312.)

46. Section 820 — This section as to interpleader applies only to proceedings by motion, and by a defendant. (*Baltimore and Ohio R. Co.* agt. *Andrews*, 90 N. Y., 234.)

47. Section 822 — Dismissal of complaint for delay in prosecuting the action — an appeal should be

taken from the order, and not from the judgment — General Rule 36. (*See James* agt. *Shea*, 28 Hun, 74.)

48. Section 829 — Where parties to an action have been examined before trial, each at the instance of the opposite party, under section 870 of the Code of Civil Procedure, for the purpose of assisting such opposite party to prepare for trial, and such examinations are reduced to writing and signed by the respective parties, and the defendant subsequently dies and his representative is substituted in the case, whereby the plaintiff becomes incompetent under this section of the Code of Civil Procedure to give testimony concerning personal transactions had with the deceased:

Held, 1st. That the plaintiff could then prove such personal transactions by reading his previous deposition to the jury, although such deposition was taken by the defendant's counsel for their own benefit and not for benefit of plaintiff.

2d. That it was error to dismiss the plaintiff's complaint for lack of proof which was contained in such deposition.

3d. That a stipulation in the action made between the parties during the lifetime of defendant was not violated by his decease. (*McDonald* agt. *Woodbury*, ante, 226.)

49. Section 829 — Under the provisions of this section of the Code of Civil Procedure, prohibiting a party to an action from testifying in his own behalf against "a person deriving his title or interest from, through or under a deceased person," concerning a personal transaction or communication between the witness and the deceased person, a party cannot testify to a conversation between himself and a deceased grantor, under whose conveyance the opposite party claims, although the latter was not the immediate

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grantee of the deceased, but derived title through one or more *mesne* conveyances. (*Pope* agt. *Allen*, 90 N. Y., 298.)

50. Section 829 — C. and W. owned certain real estate as partners; W. executed a quit-claim deed of his interest to C., who executed in return his bond with a mortgage on the premises for \$5,000, which the mortgage recited was for the purchase-price. On the same day W. assigned the mortgage to S. for \$4,500, both C. and W. joining in a statement that it was given for a good consideration, and not for the purpose of raising money. C. and wife subsequently conveyed the premises to M., who thereafter conveyed them to Mrs. C. In an action to foreclose the mortgage by plaintiffs, who claimed as assignees, the defense was that the transaction was, in fact, a usurious loan to the firm, the deed and mortgage having been executed at the instigation of S. to avoid the usury law. S. died prior to the commencement of the action. On the day before the trial W. executed to Mrs. C. a quit-claim deed of his interest in the premises. W. was called as a witness for defendants, and was allowed to testify, under objection and exception, to a conversation had with S. before the execution of the mortgage, which tended to sustain the defense: *Held*, error; that the witness was incompetent under this section of the Code of Civil Procedure. (*Smith et al.* agt. *Cross et al.*, 90 N. Y., 549.)

51. Section 829 — *It seems*, that when the mere fact that a party has had a conversation with a deceased person, to whom the opposite party stands in the relation specified in the provision of this section of the Code of Civil Procedure in reference to the testimony of parties, is the material question, it is not competent for such party to testify that he had the conversation (*Hier* agt. *Grant*, 47 N. Y.,

278, *distinguished*). (*Maverick et al.* agt. *Marrel*, 90 N. Y., 356.)

52. Section 829 — Evidence — a party only precluded from testifying as to personal transaction with the deceased, when the representatives of the latter have given no evidence on that subject — he may give evidence tending to contradict the evidence of the personal representatives, though it may relate to a personal transaction with the deceased. (*See Sweet* agt. *Low*, 28 Hun, 432.)

53. Section 829 — Fraudulent conveyance — each heir-at-law of the grantor may maintain a separate action to set it aside — right of an heir-at-law, not a party to the action, to testify as to personal transactions with the deceased. (*See Smith* agt. *Meagher*, 28 Hun, 423.)

54. Section 829 — A party cannot examine his adversary as to transactions with a deceased person and thereby let in his own testimony. (*See Corning* agt. *Walker*, 28 Hun, 435.)

55. Section 829 — Policy of insurance — right of the party insured to assign it — law of another state — it is presumed to be the same as that of this state, though the latter differs from that held by the supreme court of the United States — proofs of loss may be made by a person interested, though they relate to personal transactions with the deceased. (*See Cannon* agt. *North-Western M. Ins. Co.*, 29 Hun, 470.)

56. Section 829 — When a person may testify as to transactions with a deceased person — materiality of question. (*See Brown* agt. *Brown*, 29 Hun, 498.)

57. Section 829 — Evidence — personal transaction with deceased person — a son of the deceased is not interested when the estate is

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- insolvent. (*See Lathrop* agt. *Hopkins*, 29 *Hun*, 608.)
58. Section 830—The defendant appeared herein by attorney; issue was joined which was regularly brought on for trial on notice, and the defendant's attorney not appearing, the trial proceeded as upon default. B., the original plaintiff, was examined as a witness. The default was, on application of defendant, set aside and a new trial granted. Upon the second trial, the minutes of the testimony of B. given on the first trial, he having died in the meantime, were offered in evidence and rejected on the ground that defendant had no opportunity to cross-examine the witness: *Held*, error; that the evidence was competent, both at common law and under this section of the Code of Civil Procedure; and that as defendant had no power to appear and cross-examine, his failure so to do was a waiver of that privilege. (*Bradley* agt. *Mirick*, 91 *N. Y.*, 298.)
59. Section 832 — The provision of the Revised Statutes (2 *R. S.*, 701, sec. 23), rendering a person "sentenced upon a conviction for felony" incompetent to testify as a witness was repealed by the provision of this section of the Code of Civil Procedure, declaring that a person "convicted of crime or misdemeanor is notwithstanding a competent witness in a civil or criminal action," etc., and a person convicted and sentenced is competent as well as one convicted only. (*The People of the State of New York* agt. *McGloin*, 91 *N. Y.*, 241.)
60. Section 832 — A person convicted and sentenced for a crime is a competent witness — Code of Civil Procedure, section 832, as amended by chapter 542 of 1879. (*See People* agt. *McGloin*, 28 *Hun*, 150.)
61. Section 853 — Witness — penalty for a failure to attend a trial — damages resulting from his non-attendance must be shown. (*See Carrington* agt. *Hutson*, 28 *Hun*, 871.)
62. Section 872—Examination before trial of the defendant, to enable the plaintiff to prepare his complaint—when it should be directed. (*See Hutchinson* agt. *Lawrence*, 29 *Hun*, 450.)
63. Section 872, sub. 4—Evidence—examination of a party as a witness before the trial—only allowed to enable the applicant to procure testimony to make out his own case. (*See Fourth Nat. Bank* agt. *Boynston*, 29 *Hun*, 441.)
64. Sections 887, 888, 889—Commission to examine a party in his own behalf — not allowable if the court has reason to believe the application is not made in good faith. (*See Clark* agt. *Candee*, 29 *Hun*, 139.)
65. Section 988 — When an action is not brought to recover chattels "distrained" within the meaning of. (*See Ackerman* agt. *Delude*, 29 *Hun*, 187.)
66. Section 999 — Upon a trial by jury the trial judge may, in a proper case, award a new trial upon a dismissal of the complaint. (*Pollock* agt. *Wannemaker*, ante, 508.)
67. Section 1003 — A misdirection by the court upon the question of the burden of proof, upon the trial by jury of specific questions of fact in such an action, may, "in the discretion of the court which reviews it, be disregarded, if it is of opinion, that substantial justice does not require that a new trial should be granted. (*Post et al.* agt. *Mason*, 91 *N. Y.*, 539.)
68. Section 1041—Chapter 532, Laws of 1881, amending this section, in so far as it provides for the selec-

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tion of grand jurors in and for the city of Albany, is unconstitutional, but that part of the act which relates to the selection of petit jurors is constitutional. (*The People* agt. *Petrea*, ante, 59.)

69. Section 1041—Chapter 582, Laws of 1891, amending this section of the Code of Civil Procedure, in so far as it provides for the selection of grand jurors in and for the city of Albany, is unconstitutional.

When objection is made to the impanneling of grand jurors under such law, it must be sustained.

A grand jury obtained by methods which the constitution forbids cannot be a valid grand jury under the constitution.

Valid objections made to a grand jury before its organization, but then reserved and not decided, and renewed after indictment, must be held effectual to quash the indictment. (*The People* agt. *Duff*, ante, 365.)

70. Section 1207—Even if the prayer for judgment was for equitable relief, an answer having been interposed, the plaintiff could have any relief "consistent with the case made by the complaint and embraced within the issue." (*Murtha* agt. *Curley*, ante, 372.)

71. Section 1241—When a direction to pay money will not be enforced by attachment. (*See Noland* agt. *Noland*, 29 *Hun*, 630.)

72. Section 1268 — A judgment against a bankrupt will not be discharged under this section of the Code of Civil Procedure where it appears by affidavit that the judgment was recovered not against defendant alone, but jointly with another, and is not the judgment covered by the discharge of the bankrupt, and that plaintiff had no knowledge, actual or constructive, of the bankruptcy proceedings, that he was not named in the proceedings as a creditor, and that

the omission of the name of plaintiff as a creditor and the substitution of a similar name was with fraudulent intent. (*Seaman* agt. *McReynolds*, ante, 521.)

73. Section 1268 — A judgment having been perfected in this action against plaintiff for costs and for damages occasioned by a temporary injunction issued therein, a settlement was made between the parties and a release executed by defendants in fraud of the rights of H. & B., their attorneys, which release was set aside on motion. An action was then brought by said attorneys against the parties herein to determine and enforce their lien upon the judgment. Before the trial thereof the plaintiff here was discharged in bankruptcy. Judgment was rendered and perfected adjudging the former judgment to be in full force and unpaid, and that the attorneys had a lien to an amount specified, and were entitled to enforce a collection thereof. On motion under this section of the Code of Civil Procedure to have the judgment herein canceled and discharged of record because of the discharge in bankruptcy:

Held, that plaintiff was not barred by the judgment in favor of the attorneys; that said judgment had no other effect than to determine the extent of and to enforce their lien, leaving the original judgment, like other debts of the bankrupt, subject to the bankrupt law; and that he was entitled to the relief sought. (*Blumenthal* agt. *Anderson*, 91 *N. Y.*, 171.)

74. Section 1269—Judgment.—how far a party to the action is concluded by it—right of one who has been discharged in bankruptcy to have judgments against him canceled—Code of Civil Procedure, section 1268. (*See Blumenthal* agt. *Anderson*, 28 *Hun*, 93.)

75. Section 1204—Under this sec-

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tion of the Code an attorney, though not a party to the action, can appeal from an order refusing his fees.

An allowance may be made to counsel upon the discontinuance of a divorce case, under section 1769 of the Code (*See Chase* agt. *Chase*, ante, 308).

A discretionary order is appealable to the general term when it affects a substantial right. (*Louden* agt. *Louden*, ante, 411.)

76. Section 1303 — An amendment of a notice of appeal from an order denying a motion for a new trial, so as to make it also a notice of appeal from a judgment, may not be granted after the time for appealing from the judgment has expired, as the effect of the amendment is to allow an appeal from the judgment, which the court has no power to do (*Code of Civil Pro.*, secs. 783, 784).

Neither the provision of the Code of Civil Procedure (sec. 1303) authorizing omissions to be supplied, or amendments to be made to perfect an appeal, nor the provision (sec. 724) allowing the court "to supply an omission in any proceedings," or to "permit an amendment thereof," apply to the case of such an amendment.

Mott agt. *Lansing* (3 *Lans.*, 510); *Bouton* agt. *Bouton* (40 *How. Pr.*, 217); *S. C.* (40 *Id.*, 11), distinguished. (*Lavalle* agt. *Skelly*, 90 *N. Y.*, 546.)

77. Section 1323 — Vacation of a judgment, after it has been paid — remedies of the judgment debtor. (*See Kidd* agt. *Curry*, 29 *Hun*, 215.)

78. Sections 1327, 1331 — Stay of proceedings upon appeals from judgments in foreclosure cases — election of appellant as to the form of the undertaking. (*See Grow* agt. *Garlock*, 29 *Hun*, 598.)

79. Sections 1332, 1355 — Where the sureties to an undertaking, given to stay proceedings on appeal to

general term from a final judgment, are excepted to, and they fail or refuse to justify, and justification is not waived by the respondent, the sureties are discharged from liability; the effect of the failure to justify "is the same as if the undertaking had not been given." As to whether the respondent may after exception taken, and before the refusal of the sureties to justify, waive the exception, *quære*. *Decker* agt. *Anderson* (39 *Barb.*, 846); *Ballard* agt. *Ballard* (18 *N. Y.*, 491); *Gibbons* agt. *Berhard* (3 *Bosw.*, 635); *Hill* agt. *Burke* (62 *N. Y.*, 111); *Knapp* agt. *Anderson* (71 *id.*, 466); *McSpedon* agt. *Bouton* (5 *Daly*, 30), distinguished. (*Manning* agt. *Gould et al.*, 90 *N. Y.*, 476.)

80. Section 1337 — Where the facts sworn to by defendants' witnesses are either contradicted or do not conclusively repel the presumption of marriage; this court is precluded from reviewing the question and the finding of the jury is conclusive. (*Hynes et al.* agt. *McDermott et al.*, 91 *N. Y.*, 451.)

81. Section 1351 — Notice of entry of order — what is a sufficient notice to start the running of the thirty days, within which an appeal must be taken. (*See Baker* agt. *Hatfield*, 29 *Hun*, 670.)

82. Sections 1365, 1375 — Where, in an action in the nature of a creditor's bill founded upon a judgment and execution issued and returned *nulla bona*, it appeared by affidavit that the judgment was for deficiency in foreclosure; that the judgment of foreclosure was rendered September 25, 1876; the referee's report of sale made October 25, 1876, showing a deficiency, for which the judgment was docketed on January 22, 1878:

Held, that such docketing was the entry of judgment within the meaning of the Code, and that

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the issuing of the execution on the 18th of December, 1882, was within five years, it being intended by these sections to limit the time within which execution may issue, of course, upon any judgment to five years after the right to issue the same has fully accrued. (*Cupper agt. Frank, ante, 396.*)

83. Section 1371 — Supplementary proceedings — requirements of an execution issued upon a judgment recovered against an assignee for the benefit of creditors — the assignee may be examined although proceedings for the settlement of his accounts are pending. (*See Felt agt. Dorr, 29 Hun, 14.*)

84. Section 1380, 1381 — Execution — application for leave to issue it, after the death of the judgment debtor. (*See Kerr agt. Kreuder, 28 Hun, 452.*)

85. Section 1421 — Under the provision of this section of the Code of Civil Procedure, providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant, it is not requisite in order to authorize the substitution that the bond should have been given prior to the levy. It is sufficient if it appears that it was given upon claim being made by plaintiff to the property levied upon. (*Hessberg agt. Riley, 91 N. Y., 377.*)

86. Section 1487 — In an action to recover for goods sold, the complaint contained no allegations of fraud on the part of the vendee; an order of arrest, however, was issued and executed, and upon the trial plaintiff gave evidence tending to show that at the time of making the purchase, and to in-

duce the credit, defendant made false representations as to his solvency. The court, in submitting the question of fraud to the jury, stated, in substance, that if the facts as to the fraud claimed by plaintiff were found by the jury, the law gave him an additional remedy, i. e., a body execution and imprisonment under it, and it was for the jury to determine whether plaintiff was to have this right as the result of their verdict or simply to be remitted to the ordinary rights of a creditor: *Held*, no error. (*Keller et al. agt. Strasburger, 90 N. Y., 379.*)

87. Section 1487 — Execution against the person — in what cases it may issue, when no order of arrest has been previously granted. (*See Aetna Ins. Co. agt. Shuler, 28 Hun, 338.*)

88. Sections 1525, 1526 — L., who had purchased land subject to a mortgage which, by a covenant in her deed, she assumed and agreed to pay, was evicted under a judgment against her in an ejectment suit. In an action subsequently brought to foreclose the mortgage, wherein a personal judgment was asked against L. for any deficiency, she set up the eviction by paramount title as a defense to this claim. She succeeded in her defense, but judgment of foreclosure and sale was rendered:

Held, that the purchaser at the foreclosure sale was an assignee within the meaning of these sections of the Code of Civil Procedure, authorizing the vacation of a judgment in ejectment and the granting of a new trial "upon the application of the party against whom it was rendered, his heir, devisee or assignee;" and that an order made upon the application of the purchasers vacating the judgment in the ejectment suit, granting a new trial and making them parties defendant therein, was properly granted. (*Howell et al. agt. Leavitt et al., 90 N. Y., 238.*)

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89. Section 1766—An action by a wife against her husband for maintenance and support simply is not maintainable under this section of the Code of Civil Procedure; the provision of said Code authorizing a judgment, making provision for maintenance and support without a judgment of separation, applies only where the action is for a separation. It is only when an action is brought by the wife for divorce or separation, as prescribed by said Code, that an allowance for alimony is proper. Where, therefore, the complaint in an action by a wife against her husband alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance: *Held*, that the court had no jurisdiction to make an order granting alimony *pendente lite* or counsel fees. (*Ramsden* agt. *Ramsden*, 91 N. Y., 281.)
90. Section 1769—Under section 1294 of the Code, an attorney, though not a party to the action, can appeal from an order refusing his fees.
An allowance may be made to counsel upon the discontinuance of a divorce case, under this section of the Code (*See Chase* agt. *Chase*, ante, 308).
A discretionary order is appealable to the general term when it affects a substantial right. (*Louden* agt. *Louden*, ante, 411.)
91. Section 1769—Alimony and counsel fees—in what cases they may be granted. (*See Ramsden* agt. *Ramsden*, 28 Hun, 285.)
92. Section 1780—Foreign corporation—when it may be sued here by a non-resident—supplemental complaint by the assignee of one incompetent to sue—leave to file it will be denied. (*See Irvine* agt. *Oregon Railway and Nav. Co.*, 28 Hun, 269.)
93. Sections 1781, 1782—The term “creditor,” as used in these sections of the Code of Civil Procedure, means a judgment creditor and not a creditor at large. A creditor at large cannot maintain an action for the relief provided in section 1781. (*Paulsen* agt. *Van Steenberg*, ante, 342.)
94. Sections 1835, 1836—Costs—allowance of, against executors and administrators—when proper. (*See Horton* agt. *Brown*, 29 Hun, 654.)
95. Section 1836—Costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer: *Held*, that as defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by this section of the Code of Civil Procedure. (*Meltzer* agt. *Doll et al.*, 91 N. Y., 366.)
96. Section 1861—Action to establish a will—what is a sufficient allegation of the non-residence of the testator. (*See Younger* agt. *Duffie*, 28 Hun, 242.)
97. Sections 1909, 1912, 1913—Judgment—an assignee of it may sue thereon without first obtaining leave from the court. (*See Carpenter* agt. *Butler*, 29 Hun, 251.)
98. Section 1926—Action by a town officer under this section of the Code of Civil Procedure—it is only “in a proper case” that the court will substitute his successor upon the expiration of his term of office—the order of the special term granting an application for substitution is appealable—Code of Civil Procedure (*Sec.* 1930). (*See Farnham* agt. *Benedict*, 29 Hun, 44.)
99. Section 1930—Action by a town officer under section 1926, Code of Civil Procedure—it is only “in a proper case” that the court will substitute his successor upon the

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expiration of his term of office — the order of the special term granting an application for substitution is appealable. (*See Farnham agt. Benedict*, 29 Hun, 44.)

100. Sections 1953, 1956—Under section 1953 of the Code of Civil Procedure, by proceedings in the action subsequent to final judgment upon the right and in favor of the person alleged to be entitled to the office, the person thus found entitled to the office may recover in the same action against the defendant the damages which he has sustained in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.

Upon such proceeding in the action, though subsequent to the verdict and judgment upon the title to the office, the defendant is entitled to a hearing and trial.

Section 1956 in terms authorizes the court to impose in an action of this character, a fine, but to justify the imposition, the court should have before it evidence showing that the defendant has been guilty of some act in taking or holding the office from which he has been evicted, which was criminal, or, at least, grossly improper.

It was assumed in the enactment of section 1956 that the evidence given upon the trial of the action would place the court in possession of all the facts upon which it would act, and if the proof given upon the trial shows nothing to justify the imposition of a fine, there is no procedure given to supply the omission. (*The People ex rel. Swinburne agt. Nolan*, ante, 468.)

101. Section 2122, subdivision 2—*Certiorari*—writ of, cannot issue while an appeal is pending. (*See People ex rel. Benedict agt. Dennison*, 28 Hun, 328.)

102. Section 2140—Errors in the admission and rejection of evidence

cannot be reviewed by *certiorari*. (*See People ex rel. Mizner agt. Hair*, 29 Hun, 125.)

103. Sections 2234, 2238—*Mandamus* to compel a judicial officer to act — when the court on proof that the particular officer's time was taken up with other matters, will refuse it, in the exercise of its discretion. (*People ex rel. Cavanagh agt. McAdam*, 28 Hun, 284.)

104. Sections 2362, 2363, 2245 — The execution of the warrant in summary proceedings for dispossession of a tenant will not be stayed when the plaintiff has a remedy at law. The remedy by injunction is confined to cases and conditions in which it might be granted to stay the execution of a judgment in an action of ejectment. (*Broadwell agt. Holcomb*, ante, 502.)

105. Section 2286—Contempt — imprisonment of an attorney for a failure to pay a fine — what statements as to his inability to pay it do not justify his discharge—1843, chapter 9. (*See Matter of Steinert*, 29 Hun, 301.)

106. Sections 2423, 2426 — Corporation — a petition for its voluntary dissolution must state facts showing that such dissolution will be beneficial to its stockholders — the order requiring persons interested to show cause must comply strictly with the statute — objections, how taken — report of referee. (*See Matter of Pyroclastic Maganess Co.*, 29 Hun, 429.)

107. Section 2436 — An affidavit to obtain an order for the examination of a judgment-debtor in aid of execution, which states as a ground for such examination "that as deponent is informed and believes the said defendant has property which he unjustly refuses to apply towards the satisfaction of the judgment," is insufficient to authorize the order.

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The affiant should give the name of his informant with his means of knowledge, and shall describe the property and also allege a demand. (*Manken et al. agt. Pape, ante, 453.*)

108. Sections 2441, 2458 — Proceedings supplementary to an execution may be taken upon a judgment for *costs only*, rendered against a plaintiff. Appearance is predicable of every party to an action who submits himself to the jurisdiction of the court, whether plaintiff or defendant, and plaintiff's appearance in the action is complete when a summons in proper form, signed by himself or his attorney, has been served upon the defendant.

An affidavit which states that H. was indebted to the judgment debtor in a sum exceeding ten dollars, to wit, \$100, is sufficient to give the judge jurisdiction to grant an order to examine a person having property of a judgment debtor. A man is indebted equally whether his debt is due or to become due. (*Davis agt. Herrig, ante, 290.*)

109. Section 2447 — Supplementary proceedings — when a receiver's title is disputed, so that he cannot obtain an order requiring the delivery of property of the debtor from a third person. (*See Moller agt. Wells, 29 Hun, 587.*)

110. Section 2463 — Supplementary proceedings — earnings of a judgment debtor — in order to justify his expending them after an injunction is obtained, it is necessary for him to obtain an order declaring them exempt. (*See Hancock agt. Seers, 29 Hun, 96.*)

111. Section 2464 — The court has no power, without personal notice to the judgment debtor, to make an order directing a receiver appointed in supplementary proceedings, to apply any portion of the funds coming to his hands in pay-

ment of judgments other than that under which he was appointed, or those to which his receivership has been extended as prescribed by this section of the Code of Civil Procedure. It is his duty to restore to the judgment debtor any surplus after the satisfaction of these judgments, and such an order made without notice to the debtor is not binding upon him, and would be no protection to the receiver. (*Goddard agt. Stiles, 90 N. Y., 199.*)

112. Sections 2473, 2481, 2743 — As incident to the duty imposed upon surrogates by these sections of the Code of Civil Procedure, to settle the accounts of executors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid. (*In Matter of Verplanck, 91 N. Y., 439.*)

113. Section 2481, subdivision 6 — Surrogate — jurisdiction of, over infants — the failure to appoint a guardian for them renders the judgment voidable, but not void — within what time an infant must apply to have the judgment vacated. (*See Matter of Becker, 28 Hun, 207.*)

114. Sections 2554, 2555 — Under these sections of the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for contempt can be instituted as provided for in said Code. (*In Matter of Dissoway, 91 N. Y., 235.*)

115. Sections 2556, 2557, 2558, 2560, 2565, 2589 — Except where an appellate tribunal has given directions in the premises, the sur-

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rogate has no power to award compensation to special guardians for services rendered by them as such special guardians in proceedings on appeal from orders or decrees of this court; nor with that exception has he any power to make to them or to any other person in their capacity as parties to such proceedings any award as costs or allowances. (*Matter of Hewitt, ante*, 187.)

116. Sections 2561, 2562—Costs can only be awarded to a party and not to counsel or attorneys. If a party have a dozen counsel he can be awarded no more costs than if he had but one.

Under section 2561 of the Code of Civil Procedure, in case of a contest, the limit which the surrogate cannot exceed in awarding costs is seventy dollars, and in addition ten dollars per day, less two, for each day actually occupied on the trial upon the merits. The time which may have been spent by an attorney in preparing pleadings, making briefs, ascertaining facts, appearing merely where the case is for any cause adjourned, and appearing to settle the decree, can none of them be regarded as any part of the trial or hearing upon the merits for which a per diem allowance can be made under that section. But a summing up or argument made to the court must be regarded as a hearing upon the merits.

Under section 2562 of the Code of Civil Procedure executors and administrators may in addition be awarded such a sum as the surrogate decrees reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial.

In order that the surrogate may act understandingly in making an allowance, under section 2561, an affidavit should be presented specifying the number of days occupied

in the trial or hearing upon the merits. The affidavit to be presented on the part of an executor should, in addition, state separately the number of days necessarily spent in preparing the account for settlement, and the number of days consumed in preparing for trial; that a gross number of days have been occupied in making up and preparing the accounts of the executor, in preparing for trial and in the actual trial, is not sufficient. The number of days occupied in each class of work should be stated.

In all cases a bill of costs, allowances and disbursements should be prepared precisely as is the practice in the supreme court, and notice of taxation be given in the cases and manner required by that court. The stenographer's fees should be paid by the proper party, and the amount be included in the disbursements, &c., in his bill of costs, the same as if they were referee's fees in the higher courts. (*Matter of Brown, ante*, 461.)

117. Sections 2608, 2609 — Right of one administrator, after the removal of his co-administrator, to sue the sureties upon the bond on which he is an obligor. (*See Boyle agt. St. John*, 28 *Hun*, 454.)

118. Sections 2647, 2648 — Surrogate—jurisdiction of, over infants—the failure to appoint a guardian for them renders the judgment voidable, but not void—within what time an infant must apply to have the judgment vacated. (*See Matter of Becker*, 28 *Hun*, 207.)

119. Section 2650 — Power of surrogate, pending a contest as to the validity of a will, to direct payments to be made to legatees. (*See Matter of McGowan*, 28 *Hun*, 246.)

120. Section 2692 — Right of one administrator, after the removal of his co-administrator, to sue the

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- sureties upon the bond on which he is an obligor, (*See Boyle* agt. *St. John*, 28 *Hun*, 454.)
121. Section 2743 — Surrogates have power, under the Code of Civil Procedure, to hear and determine controversies in regard to the title to, or any question concerning a legacy or distributive share under a will. (*Matter of Brown*, ante, 887.)
122. Sections 2851, 3356 — The provisions of section 2851 of the Code of Civil Procedure, by section 3356, did not go into effect until September 1, 1880.
Instrument deeding infant children must now be recorded within three months after the decease of the grantor to secure and preserve its validity.
The security, good conduct and well being of infant children are the important considerations to be regarded, and where those ends can only be best accomplished by depriving the mother of their custody, it is the uniform practice of the courts to give such a direction. (*Matter of Schroeder*, ante, 194.)
123. Sections 3046, 3049 — Notice of appeal — subscription of, by appellant or his attorney — amendment of. (*See Gutbrecht* agt. *P. P. and O. I. R. R. Co.*, 28 *Hun*, 497.)
124. Section 3060 — Costs paid by the appellant to the justice or his clerk, on an appeal from a district court of this city, belong to the prevailing party before the justice, and should be paid to him. The costs awarded by the justice are not designed to be held as a deposit to await the result of the appeal, but should be taxed as disbursements of the appeal in case of reversal, as provided by this section of the Code of Civil Procedure. (*Sherwood et al.* agt. *Travelers' Insurance Company of Hartford*, ante, 193.)
125. Section 3070 — Costs upon an appeal from a judgment of a justice's court — in comparing the verdicts no interest is to be added to the first. (*See Kelly* agt. *Bonesteel*, 29 *Hun*, 546.)
126. Section 3215 — The district courts have no jurisdiction in actions to recover penalties fixed by the dock department for neglect to remove merchandise from a dock or pier. (*The Mayor* agt. *Decker*, ante, 473.)
127. Sections 3227, 3228, 3229, 3238 — Where the general term reversed a money judgment recovered against defendant at special term and granted a new trial, "with costs to the appellant to abide the event of such new trial," and the court of appeals then reversed the order of the general term, and affirmed the judgment of the special term, "with costs," the plaintiff was entitled to tax the costs of the appeal to the general term (*Reversing S. C.*, 64 *How.*, 465, and *affirming S. C.*, 64 *How.*, 222). (*Murtha* agt. *Curley et al.*, ante, 86.)
128. Section 3228, subdivision 4 — Costs — the defendant is entitled to them when the recovery is for less than fifty dollars — appeal, from what it should be taken. (*See Rice* agt. *Childs*, 28 *Hun*, 303.)
129. Section 3235 — Practice — discontinuance of an action in a justice's court upon a plea of title being interposed — what is not a trial of an issue of fact at the circuit — when the defendant is entitled to costs. (*See Gates* agt. *Canfield*, 28 *Hun*, 12.)
130. Section 3240 — The costs to be allowed, and which are recoverable upon an appeal from an order granting a peremptory *mandamus* when such order is affirmed is regulated by this section of the Code of Civil Procedure, and in the discretion of the court, are the same costs which are given on

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- "an appeal from a judgment."
(*People ex rel. Bray et al. agt. Board of Supervisors of Ulster Co., ante, 327.*)
131. Section 8246—Costs—executors and trustees, unnecessarily suing in their representative capacities, are personally liable for costs. (See *Bedell agt. Barnes, 29 Hun, 589.*)
- 132.—Section 8247—When a person beneficially interested can be compelled to pay the costs. (See *Fredericks agt. Niver, 28 Hun, 417.*)
133. Section 8251 — The word "argument," as used in this section of the Code of Civil Procedure, is not to be construed to mean oral argument alone, but to comprise within its meaning a submission of the reasoning, on which counsel relies, in a printed form as well as by spoken address.
On an appeal to the court of appeals the successful party is entitled to tax sixty dollars for argument, notwithstanding the case was submitted to the court by consent without oral argument. (*Malcolm agt. Hamill, ante, 506.*)
134. Section 8253—Additional allowance — cannot be granted in an action to remove an officer of a corporation for misconduct. (See *People agt. Giroux, 29 Hun, 248.*)
135. Section 8271—Security for costs — a person suing for a violation of the excise law may be required to file it. (See *Shdrp agt. Fancher, 29 Hun, 193.*)
136. Section 8272—Security for costs — when the guardian of an infant plaintiff must give it — amount of of it. (See *Robertson agt. Brown, 29 Hun, 657.*)
137. Section 8381 — This section of the Code of Civil Procedure, providing that where an officer had commenced the performance of a service for which a fee was allowed by the statutes theretofore in force, he is entitled to the fee so allowed, not to the fee allowed by said Code, applies to the services of a sheriff on attachment. (*Woodruff agt. Imperial Fire Ins. Co., 90 N. Y., 521.*)
138. Section 8318 — The plaintiff in the attachment suit objected to any allowance on the ground that he was not liable for the compensation of the sheriff, as the latter should have looked to the lien he had upon the property attached, and required payment from the defendant before surrendering: *Held*, that this question did not arise on appeal, as the order appealed from only fixed the amount the sheriff was entitled to, and did not determine who was liable therefor. (*Woodruff agt. Imperial Fire Ins. Co., 90 N. Y., 521.*)
139. Section 8347—Proceedings were instituted in May, 1881, to punish certain persons for alleged contempts in not complying with a decree of a surrogate requesting them to pay a sum of money. No execution had been issued upon the decree: *Held*, that the proceeding to punish for contempt was not a continuance of the original proceedings in which the decree was made, but was a special proceeding; and so said provisions of the Code are made applicable to it (Sec. 8347, *subd. 11*). (*In Matter of Dissoway, 91 N. Y., 235.*)
140. Section 8347—The repeal by the act of 1880 (*chap. 245, Laws of 1880*) of the act of 1870 (*chap. 359, Laws of 1870*) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by the former act in proceedings pending before him at the time the repealing act took effect. In proceedings so pending: *Held*, that the surrogate could not exceed the maximum amount limited by the Code of Procedure (*sec. 309*); also that, although the

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costs were taxed after the Code of Civil Procedure took effect, they were not affected by its provisions, as by it (*sec. 8347, subd. 11*) the provisions of the chapter (18), in reference to surrogates' courts, are with certain exceptions, not affecting the question, only made applicable to an action or special proceeding commenced after September 1, 1880. (*In Matter of Weston*, 91 N. Y., 508.)

141. Section 8358 — An additional allowance, under this section of the Code of Civil Procedure, cannot be granted upon an interlocutory judgment sustaining a demurrer with leave to amend. The Code contemplates but one allowance, and that only upon final judgment. (*Stuckle agt. Tehuantepec Railway Co. et al.*, ante, 288.)

CODE OF CRIMINAL PROCEDURE.

1. Section 23 — As amended in 1882 — Power of a court of oyer and terminer held by a single justice of the supreme court to act in proceedings already commenced — what orders of the court of oyer and terminer are not appealable. (*See Ostrander agt. People*, 29 Hun, 518.)
2. Sections 147, 188, 200, 895, 527 — Upon the trial of an indictment for murder, a statement or confession made and signed by the prisoner was offered in evidence on the part of the prosecution. It appeared that when the prisoner was arrested the officer making the arrest, an inspector of police in the city of New York, informed him of the crime for which he was arrested, and that he (the officer) was an inspector of police, and had been watching him (the prisoner) since the shooting and saw him, in company with a man named Healey, try to steal a barrel of whiskey

the night before, also told him about his pledging a pistol with which the murder was supposed to have been committed; the prisoner thereupon said he would make a statement, a coroner was sent for, who came to police headquarters where the prisoner was in custody, and the confession in question was then made, the coroner not acting in an official capacity, but simply as a clerk to take down and prove the confession:

Held, that the evidence did not disclose any threats, and did not authorize an inference that the confession was made under the influence of fear; that assuming the paper was sworn to by the accused it was in no respect a compulsory statement, and it was properly received in evidence under the Code of Criminal Procedure (*Sec. 895*). The provisions of said Code regulating the mode of taking and authenticating the statements of prisoners accused of a crime (*secs. 188-200*) refer only to the judicial examinations therein provided for, regularly instituted before a magistrate authorized to conduct such an examination (*sec. 147*); they do not include a statement made in the manner of the one in question. As to whether the provision of the said Code (*sec. 527, as amended in 1882, chap. 860, Laws of 1882*), providing that "the appellate court may order a new trial if it be satisfied" that justice requires it, although no exceptions were taken on trial, applies to this court, *quære*. (*People agt. McGloin*, 91 N. Y., 241.)

3. Sections, 198, 199, 200 — Evidence — when the confession of a prisoner made to an officer is admissible against him — a person convicted and sentenced for a crime is a competent witness — Code of Civil Procedure, section 832, as amended by chapter 542 of 1879. (*See People agt. McGloin*, 28 Hun, 150.)

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4. Sections 239, 285, 293, 312, 313, 321, 328, 332, 362 — The Code of Criminal Procedure provides no way whereby a defendant can make the objection to a grand jury, that it was drawn from names selected pursuant to the provisions of an unconstitutional law.
The Code of Criminal Procedure controls as to every indictment found after it went into effect, whether the crime charged was committed before or after that time (*Affirming S. C.*, 64 *How.*, 130). (*The People* agt. *Petrea*, ante, 59.)
5. Sections 278, 279 — When different offenses may be charged in different counts in the same indictment. (*See People* agt. *Callahan*, 29 *Hun*, 581.)
6. Sections 301, 302 — Bench warrant issued by district attorney — requisites of. (*See People* ex rel. *Sherwin* agt. *Mead*, 28 *Hun*, 227.)
7. Section 399 — Evidence — accomplice — one purchasing liquor in violation of the excise law is not an accomplice of the seller — the question whether the witness was an accomplice is to be decided by the court. (*See People* agt. *Smith*, 28 *Hun*, 615.)
8. Section 399 — Evidence corroborating the testimony of an accomplice required by. (*See People* agt. *Courtney*, 28 *Hun*, 589; *People* agt. *Ryland*, 28 *id.*, 568.)
9. Section 399 — One purchasing a lottery ticket, with intent of informing against the seller is not an accomplice. (*See People* agt. *Noelke*, 29 *Hun*, 461.)
10. Section 415 — To what adjournments it refers — a new trial will not be granted for a harmless, inadvertent omission to comply with it. (*See People* agt. *Draper*, 28 *Hun*, 1.)
11. Sections 465, 485 — Criminal action — a new trial may be granted because the verdict is not supported by the evidence — what evidence is insufficient to show that a murder was committed with "deliberation." (*See People* agt. *Mangano*, 29 *Hun*, 259.)
12. Section 527 — As amended by chapter 360 of 1882 — right of an appellate court to grant a new trial in a criminal case, although no proper exception was taken below. (*See People* agt. *Williams*, 29 *Hun*, 520.)
13. Section 717 — Where crimes are defined in the Penal Code and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in section 15 of such Code is proper.
The court of special sessions of the city of Albany have jurisdiction to impose a fine of \$500 upon a person convicted of petit larceny. (*Matter of Hallenbeck*, ante, 401.)
14. Section 702 — Search warrant — admissibility of, in evidence. (*See People* agt. *Noelke*, 29 *Hun*, 461.)
15. Section 809, subdivisions 4, 7 — Gamesters and disorderly persons — who are. (*See People* agt. *Cutler*, 28 *Hun*, 465.)

CONSOLIDATION OF ACTIONS.

1. The supreme court has no power under the Code of Civil Procedure (sec. 817) to consolidate two actions for partition, where the subject of the one is land situate in one county, and of the other land in another county, and where one or more of the parties to the one are not parties to or interested in the subject of the other action. (*Mayor* agt. *Coffin*, 90 *N. Y.*, 312.)

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CONTEMPT.

1. Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for contempt can be instituted as provided for in said Code, sections 2554, 2555. (*In re Dissoway*, 91 N. Y., 235.)

2. Proceedings were instituted in May, 1881, to punish certain persons for alleged contempts in not complying with a decree of a surrogate requesting them to pay a sum of money. No execution had been issued upon the decree:

Held, that the proceeding to punish for contempt was not a continuance of the original proceedings in which the decree was made, but was a special proceeding; and so said provisions of the Code are made applicable to it (*Sec. 8347, subd. 11*). (*Id.*)

CLUBS.

1. In an action by a member of the Union Club, who has been expelled, to have the resolution of expulsion adjudged null and void:

Held, that the minutes and report in writing of the investigating and governing committee, is the best evidence of what took place in the meeting of such committees, and upon that the resolution of expulsion was based; and any statement of the witness (who was a member of the governing committee), as to what the committee determined by its action would be his opinion only, and as such is inadmissible. It should not be allowed to such a witness to place his interpretation upon or give his opinion of the proceedings and actions of the committee, which is evidenced by the writings:

Held, also, that it would be improper for this witness to state only his judgment as to what conduct on the part of the plaintiff he deemed to be improper and prejudicial to the club. The vote is directed to be by ballot, and when the witness deposited his ballot he settled that question as far as he was concerned. He can no more be asked to state the particular ground upon which he based his judgment than a judge, a juror or arbitrator could, after judgment, be questioned as to the reason or basis of his determination.

Held, further, that the members of a committee of investigation or discipline should not be subjected to have their action or conduct in committee meetings, assembled for discussion and decision, made the subject of public discussion and comment. It would greatly embarrass them, and prove to be a restraint upon a free debate on the questions involved. (*Loubat agt. Leroy, ante*, 188.)

COHOES (CITY OF).

1. The fines imposed and collected for offenses under section 6 of chapter 12, Laws of 1874, should be received by the Society for the Prevention of Cruelty to Animals. (*American Society for the Prevention of Cruelty to Animals agt. Doyle, ante*, 459.)
2. But an action cannot be sustained against the recorder of the city of Cohoes, who has in good faith paid over the money so received by him for such fines to the chamberlain of such city before any demand was made therefor by the plaintiff. (*Id.*)

COMPLAINT.

1. A plaintiff may in his complaint state several grounds or reasons for the relief demanded; and he also may, where there is some un-

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certainty as to the exact ground of recovery, so frame his complaint as to meet the contingencies of the trial. (*Velie* agt. *Newark City Ins. Co.*, ante, 1.)

2. Where a plaintiff has really ten distinct and separate reasons for the obtainment of the relief demanded in the complaint, and states each one therein separately and plainly, or where the plaintiff and his attorney are somewhat uncertain as to the exact ground of recovery the proof may afford, and therefore frame a complaint for the recovery of a single claim in several distinct counts or statements so as to meet the proof, an election will not be compelled. (*Id.*)
3. A complaint in an action against two out of three trustees of a manufacturing corporation, for a failure to file the annual report is not demurrable on the ground of a defect of parties defendant. (*Botsford* agt. *Dodge*, ante, 145.)
4. An allegation that the corporation is duly organized and existing, does not allege the existence of any number of trustees, although the statute requires three or more. (*Id.*)
5. A complaint which seeks to remove a cloud upon title to real estate, which not only avers the giving of a certificate of sale by the comptroller, but also contains the express averment that the comptroller intends to execute such deed is good on demurrer. (*New York, Ontario and Western Railroad Co.* agt. *Davenport*, ante, 434.)

See PLEADING.

Grinnell agt. *Church*, ante, 399.

CORPORATIONS.

1. The term "creditor," as used in sections 1781 and 1782 of the Code

of Civil Procedure, means a judgment creditor and not a creditor at large. A creditor at large cannot maintain an action for the relief provided in section 1781. (*Paulsen* agt. *Van Steenbergh*, ante, 342.)

COSTS.

1. Where the general term reversed a money judgment recovered against defendant at special term and granted a new trial, "with costs to the appellant to abide the event of such new trial," and the court of appeals then reversed the order of the general term, and affirmed the judgment of the special term, "with costs," the plaintiff was entitled to tax the costs of the appeal to the general term (*Reversing S. C.*, 64 *How.*, 465, and affirming *S. C.*, 64 *How.*, 222). (*Murtha* agt. *Curley et al.*, ante, 86.)
2. Except where an appellate tribunal has given directions in the premises, the surrogate has no power to award compensation to special guardians for services rendered by them as such special guardians in proceedings on appeal from orders or decrees of this court; nor with that exception has he any power to make to them or to any other persons in their capacity as parties to such proceedings any award as costs or allowances. (*Matter of Hewitt*, ante, 187.)
3. Costs paid by the appellant to the justice or his clerk, on an appeal from a district court of this city, belong to the prevailing party before the justice, and should be paid to him. The costs awarded by the justice are not designed to be held as a deposit to await the result of the appeal, but should be taxed as disbursements of the appeal in case of reversal, as provided by section 3060 of the Code of Civil Procedure. (*Sherwood et al.* agt. *Travelers Insurance Company of Hartford*, ante, 193.)

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4. Where supplementary proceedings were instituted upon return of an execution, and during the course of the proceeding ten dollars costs were allowed by the judge, and also the further sum of thirty dollars at the close of the examination, when a receiver was appointed:
Held, that the ten dollars allowed by the court are clearly motion costs and are collectible by execution.
Held, further, that in supplementary proceedings the final costs cannot be deemed motion costs, and are not, therefore, collectible by execution. (*Valiente* agt. *Bryan*, ante, 203.)
5. An additional allowance, under section 3253 of the Code of Civil Procedure, cannot be granted upon an interlocutory judgment sustaining a demurrer with leave to amend. The Code contemplates but one allowance, and that only upon final judgment. (*Stuckle* agt. *Tehuantepec Railway Co. et al.*, ante, 288.)
6. In an action by wife for a separation from her husband for cruel and inhuman treatment, after issue had been joined the wife returned to live with her husband, and the plaintiff's attorney, in the name and behalf of the wife, made a motion for an order compelling the defendant to pay the attorney for plaintiff a counsel fee for his services in the action:
Held, that the attorney had mistaken his remedy. Before the settlement can be set aside or treated as fraudulent, some good reason therefor must be shown, and the plaintiff herself is entitled to notice of any application for such purpose:
Held, further, that if the attorney as such has any claim for counsel fees or costs upon the defendant, he must, in his own behalf, notice his motion or bring his action to enforce such claim. (*Chase* agt. *Chase*, ante, 306.)
7. When no costs are asked for in the notice of motion none should be allowed. (*Id.*)
8. The costs to be allowed, and which are recoverable upon an appeal from an order granting a peremptory *mandamus* when such order is affirmed, is regulated by section 3240 of the Code of Civil Procedure, and in the discretion of the court, are the same costs which are given on "an appeal from a judgment." (*People ex rel. Bray et al.* agt. *Board of Supervisors of Ulster County*, ante, 327.)
9. The defendant in this action, by his wife for a limited divorce, moved to vacate an order of arrest upon which he had been held. An order denying the motion was affirmed by the general term, and an appeal to the court of appeals was dismissed, with costs. The remittitur upon the decision of the court of appeals was received by the attorney on June 22, 1882, and on the following day the plaintiff died. Judgment was entered on the remittitur and the costs and disbursements adjusted at \$117.77:
Held, that the costs belonged to the attorney who made the disbursements and rendered the services, and that leave to issue execution for their collection should have been granted, his right to receive them being in no manner dependent upon the continuance of the life of his client. (*BRADY, J., dissents*). (*Lachenmeyer* agt. *Lachenmeyer*, ante, 422.)
10. Costs can only be awarded to a party and not to counsel or attorneys. If a party have a dozen counsel he can be awarded no more costs than if he had but one. (*Matter of Brown*, ante, 461.)
11. Under section 2561 of the Code of Civil Procedure, in case of a contest, the limit which the surrogate cannot exceed in awarding costs is seventy dollars, and in ad-

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- dition ten dollars per day, less two, for each day actually occupied on the trial upon the merits. The time which may have been spent by an attorney in preparing pleadings, making briefs, ascertaining facts, appearing merely where the case is for any cause adjourned, and appearing to settle the decree, can none of them be regarded as any part of the trial or hearing upon the merits for which a per diem allowance can be made under that section. But a summing up or argument made to the court must be regarded as a hearing upon the merits. (*Id.*)
12. Under section 2562 of the Code of Civil Procedure executors and administrators may in addition be awarded such a sum as the surrogate deems reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial. (*Id.*)
13. In order that the surrogate may act understandingly in making an allowance, under section 2561, an affidavit should be presented specifying the number of days occupied in the trial or hearing upon the merits. The affidavit to be presented on the part of an executor should, in addition, state separately the number of days necessarily spent in preparing the account for settlement, and the number of days consumed in preparing for trial; that a gross number of days have been occupied in making up and preparing the accounts of the executor, in preparing for trial and in the actual trial, is not sufficient. The number of days occupied in each class of work should be stated. (*Id.*)
14. In all cases a bill of costs, allowances and disbursements should be prepared precisely as is the practice in the supreme court, and notice of taxation be given in the cases and manner required by that court. The stenographer's fees should be paid by the proper party and the amount be included in the disbursements, &c., in his bill of costs, the same as if they were referee's fees in the higher courts. (*Id.*)
15. The word "argument," as used in section 8251 of the Code of Civil Procedure, is not to be construed to mean oral argument alone, but to comprise within its meaning a submission of the reasoning, on which counsel relies, in a printed form as well as by spoken address. (*Malcolm agt. Hamill, ante, 506.*)
16. On an appeal to the court of appeals the successful party is entitled to tax sixty dollars for argument, notwithstanding the case was submitted to the court by consent without oral argument. (*Id.*)
17. The act of 1862 (*chap. 487*), under which the plaintiff and his associates (the harbor masters) were appointed, having been repealed and the offices created by it abolished, the penalties imposed by the act are not recoverable even in pending actions. (*Cole agt. Ross, ante, 520.*)
18. Under such circumstances the court may allow a discontinuance of the action without costs. (*Id.*)
- See INSURANCE (LIFE).
The People agt. Globe Mutual Life Ins. Co., ante, 289.
- See SUPPLEMENTARY PROCEEDINGS.
Davis agt. Herrig, ante, 290.
19. In an action brought to recover the sum of seventy-seven dollars and forty-five cents, the plaintiff received from the defendant, before the latter had answered, the sum of fifty-five dollars on account of the amount due, the defendant promising to pay the balance at a

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- time named, if the plaintiff would extend the time of payment to that date. After that date the defendant failed to pay the balance, and served an answer setting up the payment made, and demanding a dismissal of the complaint, with costs. Judgment for the balance due having been ordered for the plaintiff upon an application for to have the answer stricken out as frivolous: *Held*, that as the judgment was for less than fifty dollars, the defendant was entitled to recover costs. (*Rice* agt. *Childs*, 28 *Hun*, 308.)
20. That the appeal was properly brought from an order refusing a motion for retaxation of costs, and that it was not necessary to appeal from the judgment. (*Id.*)
21. Section 8246 of the Code of Civil Procedure does not exempt executors, administrators or trustees of an express trust from liability to costs in actions brought by them in their representative capacities, unless the actions are necessarily brought by them in such capacities. In an action brought by an assignee in bankruptcy, as such, to recover for a wrongful taking from his possession of personal property which he had received as a part of the assets of the bankrupt, a judgment was rendered in favor of the defendant: *Held*, that as the assignee might have brought the action in his individual, instead of his representative, capacity, he was personally liable for the costs thereof. (*Bedell* agt. *Barnes*, 29 *Hun*, 589.)
22. Under sections 1835 and 1836 of the Code of Civil Procedure no costs can be allowed to the plaintiff in an action against an executor who has published the statutory notice requiring all creditors to present their claims, unless the claim, upon which the action is brought, was presented to him within the time limited by the notice, and unless, also, the executor unreasonably resisted or neglected to pay the same, or refused to refer it as prescribed by law. (*Horton* agt. *Brown*, 29 *Hun*, 654.)
23. A judgment entered by the plaintiff in an action for the recovery of money only, upon a verdict for more than fifty dollars, was reversed by the general term and a new trial granted, with costs to the defendant to abide the event. The court of appeals reversed this order and affirmed the judgment, with costs: *Held*, that the plaintiff was entitled to include in his bill of costs the items allowed by the Code for services rendered and disbursements incurred upon the appeal to the general term. (*Revere Copper Co.* agt. *Dimmock*, 29 *Hun*, 299.)
24. In determining whether a verdict rendered upon an appeal from a judgment of a justice's court "is more favorable to the appellant by the sum of ten dollars than the verdict or decision in the court below," as provided in section 3070 of the Code of Civil Procedure, the second verdict must be compared with the first, and not with the first as increased by the interest accruing upon it from the time it was rendered to the time of the recovery of the second one. (*Kelly* agt. *Bonesteel*, 29 *Hun*, 546.)
25. Under section 3272 of the Code of Civil Procedure the court, upon an application to compel the guardian of an infant plaintiff to file security for costs, cannot require security for more than \$150 to be given. Where a party moves promptly he is entitled, as a matter of right, to an order requiring the guardian to give security as therein provided, but where he neglects so to move, the granting or withholding of the order rests in the discretion of the court. (*Robertson* agt. *Barnum*, 29 *Hun*, 657.)
26. A person who brings an action in

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- the name of the overseer of the poor under section 80 of chapter 628 of 1857, as amended by chapter 820 of 1873, to recover penalties for a violation of the excise law, may be required to file security for costs under section 3271 of the Code of Civil Procedure. (*Sharp* agt. *Fletcher*, 29 *Hun*, 193.)
27. No additional allowance can be granted under section 3258 of the Code of Civil Procedure in an action brought to procure the suspension and removal from office of the president of a fire insurance company, upon the ground of his misconduct, as the subject-matter involved therein has no pecuniary value. (*People* agt. *Giroux*, 29 *Hun*, 248.)
28. In an action to compel defendant to lower a dam which sets back water upon plaintiff's lands, and to recover damages, plaintiff is not entitled to an extra allowance computed upon the value of his lands, but only upon the amount of damages recovered. (*Rothery* agt. *N. Y. Rubber Co.*, 90 *N. Y.*, 80.)
29. Plaintiff is not entitled to tax, as an item of disbursements, the amount paid to a surveyor for surveys, maps, etc., made for the purposes of the trial. (*Id.*)
30. Costs in an action to restrain the infringement of a trade-mark are in the discretion of the court. (*Low* agt. *Hart*, 90 *N. Y.*, 457.)
31. Where, in an action brought by the attorney-general against an insolvent life insurance company, after the entry of judgment dissolving the corporation and appointing a receiver of its assets, certain of the policyholders were allowed to intervene, who appeared by attorneys and contested the allowance of commissions, claimed by the receiver, which were materially reduced: *Held*, that the court had no power to make an allowance to the intervenors out of the funds in the hands of the receiver for their disbursements and counsel fees, as they were simply individual parties protecting their own interests. (*Att'y-Gen'l.* agt. *N. Am. L. Ins. Co.*, 91 *N. Y.*, 57.)
32. The cases where such allowances have been made to trustees, or to one or more of several persons interested in a common fund who have brought suit to protect or recover the fund, distinguished. (*Id.*)
33. In an action against creditors costs were imposed upon defendant, payable out of the estate, because of refusal, on his part, to refer: *Held*, the defendant was not injured, he could not be heard to complain of the absence of the certificate of the judge who tried the cause required by the Code of Civil Procedure (*Sec. 1836*). (*Meltzer* agt. *Doll*, 91 *N. Y.*, 365.)
34. In an action brought by plaintiff as creditor of a manufacturing corporation, on behalf of himself and other creditors, against the stockholders, to enforce the liability imposed by the general manufacturing act (*sec. 12, chap. 40, Laws of 1848*) upon stockholders, a judgment was entered authorizing and directing the county treasurer to docket judgments against the stockholders for the maximum amount of their possible liability, and to collect thereon, by execution, enough to pay the claims of creditors, as proved, and their costs, and out of the payments to him to retain his lawful commissions, and distribute the residue to those entitled. The commissions of the county treasurer were stated in plaintiff's bill of costs, and taxed as an item of disbursements: *Held*, error; that the county treasurer was authorized in issuing executions, for the purpose of providing enough to pay creditors, to include his commissions, and they were not properly chargeable as

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plaintiff's disbursements. (*Veeder* agt. *Judson*, 91 N. Y., 874.)

85. Certain of the papers in the case were printed upon the request of the attorneys for some of the defendants and by direction of the referee, the expense was taxed as an item of disbursements:

Held, error. (*Id.*)

86. The repeal by the act of 1880 (*chap. 245, Laws of 1880*) of the act of 1870 (*chap. 859, Laws of 1870*) in relation to the powers and jurisdiction of the surrogate of the county of New York did not affect the power of said surrogate to "grant allowance in lieu of costs" given by the former act in proceedings pending before him at the time the repealing act took effect. (*In re Estate of Weston*, 91 N. Y., 502.)

87. In proceedings so pending:

Held, that the surrogate could not exceed the maximum amount limited by the Code of Procedure (*sec. 309*); also that, although the costs were taxed after the Code of Civil Procedure took effect, they were not affected by its provisions, as by it (*sec. 8347, subd. 11*) the provisions of the chapter (18), in reference to surrogates' court, are with certain exceptions, not affecting the question, only made applicable to an action or special proceeding commenced after September 1, 1880. (*Id.*)

CONSTITUTIONAL LAW.

1. A board of supervisors of a county may, under chapter 482 of the Laws of 1875, create and give to county officers a clerk. (*The People ex rel. Masterson* agt. *Gallup*, ante, 106.)
2. The resolution of the board of supervisors of Albany county, creating and giving to the coroners of such county a clerk, and fixing his compensation, is not in violation of section 24 of article 8 of

the Constitution, which forbids the legislature, common council of a city or the "board of supervisors" to grant any extra compensation to any public officer, servant, agent or contractor. (*Id.*)

See JURORS.

The People agt. *Petrea*, ante, 59.

See PENAL CODE.

Adams Express Company agt. *Board of Police*, ante, 72.

See JURORS.

The People agt. *Duff*, ante, 365.

CONTRACT.

1. The plaintiff contracted to sell and the defendant to purchase certain property, under the general description in the contract of "store and premises;" and plaintiff represented that he was offering the premises for sale just as they then appeared, with the water-closets, basins, &c., as parts of and belonging to the property to be sold. Between the making of the contract and the meeting of the parties for the purpose of executing the conveyance, the building had been dismantled by the removal by the tenant, who owned them, of the gas and water pipes, and other fixtures, so that it was at that time in an untenable condition:

Held, that though no fraud was shown on the part of the vendor, and though the fact that the fixtures belonged to the tenant was not known to him, a verdict for the defendant in this action to enforce the contract was properly directed, for the plaintiff was bound to show upon the trial that his assignor was, on the day and place specified in the contract ready and willing to perform the contract by a compliance with its terms, which he could only do under the circumstances by conveying the property substantially in the condition in which it was

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when it was sold. Nor could he claim the performance on the part of the purchaser by offering to pay to him the money value of the fixtures that had been taken away. (*Smith* agt. *Sturges*, ante, 360.)

CONVEYANCE.

1. While a belief in spiritualism is not *per se* sufficient cause for setting aside a marriage and a conveyance of property, yet where a shrewd, designing, lewd and unchaste woman, in middle age, knowing that an old man who is deaf and living in seclusion is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance, pretends to be a medium and to receive communications from spirits commanding that they marry and that the old man convey to her valuable property, claims to be a clairvoyant physician and to be able to cure his deafness, and by other fraudulent devices induces the old man to marry her and to convey to her the property, the marriage and conveyance will be set aside as procured by fraud and undue influence when the court is satisfied from all the evidence they were so procured. (*Hides* agt. *Hides*, ante, 17.)

DAMAGES.

See RAILROADS.

Greene agt. *N. Y. C. and H. R. R. Co.*, ante, 154.

See OFFICE AND OFFICER.

The People ex rel. Swinburne agt. *Nolan*, ante, 468.

DEED.

1. A deed of lands held in adverse possession, is void as against the party in possession, and an action will lie against him in the name of

the grantor notwithstanding such deed. (*Van Voorhis* agt. *Kelly et al.*, ante, 300.)

DEMURRER.

1. Where a demurrer is served, an answer may be interposed by way of amendment. (*Adams & Lang* agt. *West Shore, &c., Railroad Company*, ante, 329.)

DISCONTINUANCE.

1. The act of 1862 (*chap. 487*), under which the plaintiff and his associates (the harbor masters) were appointed, having been repealed and the offices created by it abolished, the penalties imposed by the act are not recoverable even in pending actions. (*Cole* agt. *Ross*, ante, 520.)
2. Under such circumstances the court may allow a continuance of the action without costs. (*Id.*)

DISCOVERY.

1. In an application for an order for the discovery of books, the petitioner stated that "he is unable to name specifically all the books which will be necessary," and the inspection is intended to cover any books which the defendants have relating to the transactions in which the plaintiff was interested:
Held, that such a discovery is unusually broad and sweeping, and not such as courts are in the habit of granting in aid of common-law actions for the recovery of a specific sum of money. (*Dickey* agt. *Austin*, ante, 420.)
2. The petition must state what information is wanted, and that the books referred to contain such entries. It is not enough to show that they probably will furnish the

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desired information. The petition should point to the places where the information sought for exists and describe the entries. (*Id.*)

3. If the discovery is plainly attainable by competent and available testimony, a production of books should not be allowed without special circumstances. (*Id.*)

4. In this action, brought by the plaintiff to recover damages for injuries sustained by him while working upon a machine, as an employe of the defendant, the latter procured an order for the examination of the plaintiff before trial. Upon an affidavit made by the plaintiff's attorney, stating, among other things, that he could not cross-examine his client on the examination before trial, or comprehend such examination, without a previous inspection of the machine, an order was made directing the defendant to allow the plaintiff's attorney to inspect the machine, and staying the examination of the plaintiff until his attorney should be allowed to make such inspection: *Held*, that the court had no power to make the order. (*Cooks* agt. *Lalanco Grojean Mfg. Co.*, 20 *Hun*, 641.)

DISTRICT COURTS.

1. Under the new Code, as before, the decision of a district court justice upon motion to vacate an attachment which had been previously issued in the action may be reviewed on appeal. (*Lang* agt. *Marks*, ante, 127)
2. The Code has made no change in the manner of granting an attachment in a district court, and the attachment must be allowed by the justice and signed by the clerk. (*Id.*)
3. Costs paid by the appellant to the justice or his clerk, on an appeal from a district court of this city,

belong to the prevailing party before the justice, and should be paid to him. The costs awarded by the justice are not designed to be held as a deposit to await the result of the appeal, but should be taxed as disbursements of the appeal in case of reversal, as provided by section 8460 of the Code of Civil Procedure. (*Sherwood et al.* agt. *The Travelers' Insurance Company of Hartford*, ante, 193.)

4. The district courts have no jurisdiction in actions to recover penalties fixed by the dock department for neglect to remove merchandise from a dock or pier. (*The Mayor* agt. *Decker*, ante, 472.)

DIVORCE.

1. Where the plaintiff, in her divorce decree, refrained from inserting a provision for her support, on the promise of defendant to pay her money from time to time, she cannot subsequently have the judgment amended by inserting such provision. (*Johnson* agt. *Johnson*, ante, 517.)

See COSTS.

Lachenmeyer agt. *Lachenmeyer*, ante, 422.)

EASEMENTS.

1. The grantor owning the lands under water, on the side of the pier, an easement therein to a reasonable distance will pass to the grantee. (*Knickerbocker Ice Co.* agt. *Forty-second Street and Grand Street Ferry R. R. Co.*, ante, 210.)
2. The first deed being recorded, the latter is subject to the easement thereby created. (*Id.*)
3. Covenants running with the land, is to be performed by a common

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grantor, when so required, in a required manner. (*Id.*)

4. The performance of the covenants by a grantor of a portion of the land in which there is an easement in favor of a grantee of another portion, may have the effect of destroying the easement. (*Id.*)

5. It will have such effect when the grantor of the common grantor has a legal interest in the performance of the covenant, and requires performance in the prescribed manner. (*Id.*)

EJECTMENT.

1. A. having an eighth interest in certain lands, subject to a life estate in B., made a conveyance of his interest to B. Thereafter A. died, leaving the plaintiff, his widow and three children him surviving; thereafter one of said three children died, leaving this plaintiff, his mother, and a brother and sister him surviving. (*Manolt agt. Petrie et al., ante, 206.*)

2. Thereafter B. died, and a partition suit was thereupon instituted, to which plaintiff was not a party, wherein it was adjudged that the conveyance from A. to B. was a mortgage:

Held, that the judgment that the conveyance from A. to B. was a mortgage was binding on the purchasers at the partition sale and those claiming under them.

Second, that the plaintiff inherited a life estate as heir of her said deceased son.

Third, that one claiming under the life tenant cannot have adverse possession against a remainderman during the life of the life tenant. (*Id.*)

ESTOPPEL.

1. Where an attachment against a non-resident debtor is served upon

a third party, who, upon demand, gives a certificate as to property or moneys in his hands belonging to the debtor, such third party is not estopped from showing, in an action brought against him on the faith of such statement, that he was honestly mistaken in making it. (*Almy et al. agt. Thurber et al., ante, 481.*)

2. The doctrine of estoppel applies only to voluntary representations, declarations, admissions and acts, and has not been extended to declarations exacted by statute. (*Id.*)

EVIDENCE.

See WILL.

Shothar agt. Sherman, ante, 9.

See LEASE.

Heilmann agt. Lazarus, ante, 95.

See CLUBS.

Loubat agt. Leroy, ante, 138.

See PRACTICE.

The People agt. Moore, ante, 177.

1. In an action to recover damages for injuries to the plaintiff's leg, alleged to have been occasioned by the defendant's negligence, it is not error for the court to allow the plaintiff to exhibit his leg to the jury. Evidence as to the condition of the leg at the time of the trial may also be given. (*Hiller agt. Village of Sharon Springs, 28 Hun, 344.*)

2. Although, under the general act providing for the incorporation of villages (*subd. 25, sec. 8, title 3 of chap. 291 of 1870*), it is for the trustees to determine where, when and how wide sidewalks shall be constructed, and whether they shall be paved, planked or flagged, and an individual cannot, by constructing a sidewalk in front of his premises, compel the trustees to accept it or keep it in repair; yet, where an individual voluntarily

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constructs a sidewalk, not merely for his own benefit, but also for that of the public, the trustees may, by acquiescence in his act for a sufficient length of time, or by other acts, show their acceptance of the sidewalk, and thus become bound to keep it in repair and render the village liable to any one who may be injured by their failure so to do. No distinct act of adoption or acceptance of the sidewalk need be shown, nor any positive recognition of it. (*Id.*)

8. Upon the final accounting of Willimina and John H. Neilly, as administrators of Alexander Waldron, deceased, Willimina Neilly, as administratrix of the estate of Sarah Byron, deceased, presented a claim against the estate of Alexander Waldron. The claim was founded upon a paper dated November 4, 1828, signed by Alexander Waldron, by which he acknowledged that he had in his possession and held in trust for his sister Sarah Byron, the sum of \$268, being the balance of a sum which he and his brother had been directed to pay to their sister by their father's will. He thereby promised to pay to her interest on the said sum as long as it remained in his hands, and to advance to her portions of the principal if necessary: *Held*, that the surrogate had jurisdiction of the claim. That the administratrix was properly allowed to prove that the signature to the paper was that of the deceased. (*Matter of Waldron*, 28 Hun, 481.)
4. That although the instrument did not create a technical trust, such as would take the case out of the statute of limitation, yet a demand was necessary to set the statute in operation, and that as none was proved the claim was not barred. (*Id.*)
5. The plaintiff in error was tried and convicted for the murder of his brother Lyman. The defense

was that he acted in self-defense. Upon the trial, a witness named Morse, called for the defense, testified that the sister of the plaintiff in error, Viola, told him that when Lyman fell after he was shot he had a revolver in his hand. On cross-examination he denied that he told Viola, in that conversation, to keep still about the matter, not to say anything and make it as light as she could for her brother. Subsequently a witness called for the prosecution was allowed, against the prisoner's objection and exception, to testify that he heard the first witness Morse make such a statement to Viola in the course of the conversation referred to: *Held*, that the evidence was properly admitted as tending to show the hostility of the witness Morse to the prosecution. (*Ostrander agt. People*, 28 Hun, 88.)

6. Another witness was asked to state what the deceased had said as to an altercation between him and the prisoner on the morning of the day he was killed, the witness having already stated that the prisoner was present at the time. The court held that anything that was said in the prisoner's presence was admissible. The witness then testified that the deceased said that the pistol he had in the morning was not good for anything, that he only took it out to scare the prisoner, and that he would not hurt a hair of his head: *Held*, that under the circumstances it must be assumed that the prisoner was present when his brother made this statement; that if he were not it rested on him to prove it. That if the prisoner had been informed some three hours before the commission of the crime that the pistol which was alleged to have been in his brother's possession was not good for anything, it was proper for the jury to have that fact before them in determining the motive which actuated him at the time of the killing. (*Id.*)

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7. In an action by the second indorser of a note against the makers, the defense was that the note had been discounted for the payee by one McGeorge, at a usurious rate of interest. The plaintiff claimed that McGeorge was simply the broker of the defendants, and that the notes had no inception in his hands. McGeorge was called as a witness by the defendants and testified that he never discounted or owned the notes, and that he had sold them as the agent of the defendants, under an agreement by which he was to receive nine and one-quarter per cent as commission. His books were produced upon the trial, but the court refused to allow the defendants' counsel to inspect them, or to compel the witness to examine them for the purpose of refreshing his memory as to the transaction as to which he had testified: *Held*, that this was error. That the defendants were entitled to know the contents of the books, for the purpose of examining McGeorge as to them, and ascertaining whether he would adhere to the evidence given by him, if he found it to be contradicted by the records which he himself had made of the transaction. *Seem*, that as the books showed the real transaction between McGeorge and the defendants, they might be admitted as evidence in the action. (*Metropolitan National Bank* agt. *Hale*, 28 *Hun*, 341.)
8. Under chapter 36 of 1880, permitting the "comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine," the proof of genuineness is to be addressed to the court as distinguished from the jury. It is somewhat analogous to evidence tending to prove the competency of one who is called as an expert witness. *It seems*, that to admit a paper without any evidence of its genuineness might be error. This action was brought upon a promissory note alleged to have been made by the defendant. Upon the trial the court admitted in evidence a deed purporting to have been executed and acknowledged by the defendant, for the purpose of comparing the signature thereof with that of the disputed note. The defendant, who was present in court, made no offer to disprove the genuineness of the signature to the deed or his identity with the person who executed it: *Held*, that the court did not err in so admitting the deed. (*Hall* agt. *Van Vranken*, 28 *Hun*, 408.)
9. An inspector of police, upon arresting one accused of murder, told him who he was; that he had seen him attempt to steal a barrel of whisky the night before, and that he knew about the pledging of the pistol with which the murder was committed. He made no threats and held out no inducements to lead the prisoner to make a statement. The prisoner having said he would make a statement, a coroner was sent for, who informed him that he had the privilege and right either to make a statement or not. The prisoner then made a statement and confession under oath: *Held*, that it was properly received in evidence upon his trial, under section 395 of the Code of Criminal Procedure. (*People* agt. *McGloin*, 28 *Hun*, 150.)
10. Sections 198, 199 and 200 of the Code of Criminal Procedure apply to an examination before a magistrate for the purpose of ascertaining whether or not a crime has been committed, and not to any proceeding before a coroner. (*Id.*)
11. Under section 832 of the Code of Civil Procedure, as amended by chapter 542 of 1879, providing that a person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent

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witness in a civil or criminal action or special proceeding, a person convicted and *sentenced*, as well as one convicted only, is a competent witness. (*Id.*)

12. Where a matter of record has been imperfectly made to appear upon the hearing, and the determination has proceeded upon such evidence, and an appeal has been taken, it is allowable for the purpose of sustaining the proceedings to produce complete record evidence, on the hearing of the appeal, to supply the defect, but it cannot be done for the purpose of producing a reversal of the decision appealed from. (*Irving National Bank* agt. *Adams*, 28 *Hun*, 108.)

13. This action was brought upon two promissory notes made by the defendant, of which the plaintiff claimed to be a *bona fide* holder, for value, without notice of any defense thereto. The defendant set up as a defense that the notes were first negotiated by him with one Follett at a usurious rate of interest. The plaintiff, upon an affidavit setting forth these facts, that it had no knowledge whatsoever with regard to such negotiations, or its terms; that Follett was and would be absent from the state for an indefinite time, and that it was informed by its attorneys, and believe, that it was necessary for the prosecution of the action to examine the defendant, "in order to establish whether such negotiation was in fact made by the said Follett; and if so, to show what were its terms and circumstances," procured an order requiring the defendant to appear and be examined: *Held*, that as it was evident that the plaintiff desired to examine the defendant, not to procure testimony which was material or necessary to enable him to make out his case upon the trial, but to discover the testimony which the defendant

could give in support of his defense, the order was properly vacated upon the defendant's application. (*Fourth National Bank* agt. *Boynton*, 29 *Hun*, 441.)

14. The plaintiff, in an action brought to obtain a judgment declaring a resolution of the governing committee of the New York Stock Exchange to be void and restraining its enforcement, applied for an order requiring the defendant, the president of the board, to appear and be examined in order to enable the plaintiff to frame his complaint. In his affidavit he stated that he had been expelled from the stock exchange, and deprived of his seat therein, which was worth \$30,000, and alleged that the proceedings by which this had been effected were unlawful and invalid. He alleged that charges had been made against him, and that he had been allowed to appear before the governing committee of the exchange and answer them; that he did not know what was subsequently done, but had received credible information in relation thereto, and that such information was not sufficiently definite to enable him to set forth the facts in his complaint; that the resolution expelling him did not receive the vote required by the constitution of the stock exchange; that some of the charges made against him were sustained and others were not, but that he was ignorant as to which were so sustained; that he had applied to the committee for information as to those matters, but had been unable to procure any; that the defendant, who was the president of the exchange, was present throughout the whole of the alleged trial, and that all the matters as to which the plaintiff sought to be informed were peculiarly within the defendant's knowledge: *Held*, that the court properly granted the application. (*Hutchinson* agt. *Lawrence*, 29 *Hun*, 450.)

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15. Upon the trial of the appellant for murder the prosecution sought to establish that one Cortright was seen at a certain time and place by one of the witnesses. The witness said that he passed a man at a certain time and place, and was allowed, against the prisoner's objection, to state that "he had an impression who it was; I don't know for certain, only who I thought it was; I thought it was William Cortright, but I don't know;" "I can't swear that this man was Cortright; I don't know whether it was him or not; it was my impression it was." *Held*, that the court erred in receiving the evidence. (*People* agt. *Williams*, 29 *Hun*, 520.)

16. Under section 527 of the Code of Criminal Procedure, as amended in 1882, it is the duty of an appellate court to look into the proceedings upon the trial to discover whether any error has occurred, and, if such error is found, to award a new trial, whether any proper exception was taken in the court below or not. After the court had charged the jury that they could not convict the defendant upon the testimony of his accomplice, unless it was corroborated by other evidence tending to connect him with the commission of the crime, the prisoner's counsel requested it to charge "that there must be evidence tending to connect the defendant with the commission of the offense; that this requires more than such evidence as merely raised a suspicion of guilt." The court refused to charge otherwise than as it had: *Held*, that although under the former practice an exception to the refusal might have been unavailing because the request was too broad in including what had already been said to the jury, yet, that under the said section of the Code of Criminal Procedure, the court must be held to have erred in refusing to charge that the evidence must be more than suf-

ficient to raise a suspicion of guilt. (*Id.*)

EXAMINATION BEFORE TRIAL

1. Where parties to an action have been examined before trial, each at the instance of the opposite party, under section 870 of the Code of Civil Procedure, for the purpose of assisting such opposite party to prepare for trial, and such examinations are reduced to writing and signed by the respective parties, and the defendant subsequently dies and his representative is substituted in the case, whereby the plaintiff becomes incompetent under section 829 of the Code of Civil Procedure to give testimony concerning personal transactions had with the deceased:

Held, 1st. That the plaintiff could then prove such personal transactions by reading his previous deposition to the jury, although such deposition was taken by the defendant's counsel for their own benefit and not for benefit of plaintiff.

2d. That it was error to dismiss the plaintiff's complaint for lack of proof which was contained in such deposition.

3d. That a stipulation in the action made between the parties during the lifetime of defendant was not violated by his decease. (*McDonald* agt. *Woodbury*, ante, 226.)

2. Where an affidavit for the examination of a defendant before trial details the circumstances as to which proof will be required, which it is expected the defendant will be able to give in such a manner as to establish to a reasonable certainty its materiality, followed by an expression of belief that the examination and testimony of the defendant relative to the issues are both material and necessary to the plaintiff for the

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prosecution of the action, the requirements of the fourth subdivision of section 872 of the Code are sufficiently complied with. (*Fogg* agt. *Fisk*, ante, 351.)

3. A refusal to answer a question on the ground of the tendency thereof to convict of a crime is a personal privilege of the witness, and to be urged when the question is put. (*Canada Steamship Company* agt. *Sinclair*, ante, 474.)
4. Unless it appear that the testimony sought by an examination before trial relates exclusively to facts which, if proven, would show that the witness was guilty of a crime, the order therefor will not be set aside. (*Id.*)
5. The mere possession of goods which have been stolen, not being necessarily inconsistent with innocence of the crime of "receiving stolen goods," a witness should be left to urge his privilege, if it exist, on the examination itself. (*Id.*)
6. In an action by a customer against his stockbrokers to recover damages alleged to have been sustained by the wrongful sale of stocks, the defense was that the sales were properly consummated upon due notice to plaintiff, by whom they were ratified. An order for the examination of plaintiff before trial was granted on affidavits that during a part at least of the period covering the transactions the plaintiff was not in the city of New York, and most of the notices were sent by telegram, and that it was desired and expected to prove that plaintiff did receive some or all of the notices so sent to him:
Held, that the order was improperly vacated on the ground that it was sought only to find out what the plaintiff would swear to, and that the examination should be allowed, notwithstanding the plaintiff alleged in his complaint that defendants never demanded

margins or collateral securities. (*Hardy* agt. *Peters*, ante, 522.)

EXCEPTION.

1. As to whether the provision of the Code of Criminal Procedure (*sec. 527, as amended in 1882, chap. 360, Laws of 1882*), providing that "the appellate court may order a new trial if it be satisfied" that justice requires it, although no exceptions were taken on trial, applies to this court, *quære*. (*People* agt. *McGloin*, 91 N. Y., 241.)

EXECUTION.

1. Under section 284 of the Code of Procedure, an execution issued after the lapse of five years from the entry of judgment, without leave of the court, is irregular, and should be vacated. The law supposes the judgment to be unpaid for five years. After that time it presumes payment, and requires the plaintiff to show by proof that the judgment, either in whole or in part, is still unpaid. (*Van Voorhis* agt. *Kelly et al.*, ante, 800.)
2. Where, in an action in the nature of a creditor's bill founded upon a judgment and execution issued and returned *nulla bona*, it appeared by affidavit that the judgment was for deficiency in foreclosure; that the judgment of foreclosure was rendered September 25, 1876; the referee's report of sale made October 25, 1876, showing a deficiency, for which the judgment was docketed on January 22, 1878:
Held, that such docketing was the entry of judgment within the meaning of the Code, and that the issuing of the execution on the 18th of December, 1882, was within five years, it being intended by sections 1865 and 1875 to limit the time within which execution

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- may issue, of course, upon any judgment to five years after the right to issue the same has fully accrued. (*Cupfer* agt. *Frank*, ante, 396.)
3. Whether, when the assets consist of a claim against an insurance company, arising upon a policy of insurance, in the name of defendant, upon the life of her husband, such interest is assignable and can therefore be reached by execution, *quære*. (*Id.*)
4. An affidavit to obtain an order for the examination of a judgment debtor in aid of execution, which states as a ground for such examination "that as deponent is informed and believes the said defendant has property which he unjustly refuses to apply towards the satisfaction of the judgment," is insufficient to authorize the order. (*Manken et al.* agt. *Pape*, ante, 453.)
5. The affiant should give the name of his informant with his means of knowledge, and shall describe the property and also allege a demand.
6. Section 298 of the old Code provided that whenever a receiver of the property of a judgment debtor was appointed, the order should be filed in the office of the clerk of the county where the judgment-roll in the action was filed, and recorded by the clerk in a book to be kept for that purpose. It further provided that, before the receiver should be vested with any real property of such judgment debtor, a certified copy of said order should be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor sought to be affected thereby is situated, and also in the office of the county in which such judgment debtor resides: *Held*, that when the judgment debtor resided and the real estate sought to be affected were situated in the same county in which the judgment-roll was filed, that it was only necessary to have the original order filed and recorded therein, and that it was not necessary to have a certified copy thereof also filed and recorded. (*Fredericks* agt. *Niver*, 28 *Hun*, 417.)
7. An order compelling a person to pay costs as being the person beneficially interested in the recovery, cannot be made until after a judgment against the plaintiff for the costs has been perfected. (*Id.*)
8. Where, after the expiration of one year from the time of the death of a judgment debtor, leave to issue an execution upon the judgment is applied for, the permission of the surrogate's court need not precede the application to the supreme court. No notice need be given of the proposed presentation of the petition to the surrogate's court for leave to issue the execution. Upon the presentation of the petition, however, the surrogate must issue citations to all persons interested, unless they appear voluntarily, in which case they will be bound by the decree, though no citations be issued. (*Kerr* agt. *Kreuder*, 28 *Hun*, 452.)
9. During the pendency of an action brought by the plaintiff against Felt & Bell, as partners, upon a note given by them, they made a general assignment for the benefit of creditors to one Dorr. Thereafter Dorr was, upon his own application, made a party defendant and allowed to answer. The plaintiff recovered a judgment against Felt & Bell, and Dorr, as assignee, for damages and costs. Subsequently, upon an affidavit showing, among other things, that an execution issued "against the property of the said George H. Dorr, as assignee," had been returned unsatisfied, an order re-

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- quiring him to appear and be examined in supplementary proceedings was granted: *Held*, that the order should be vacated on the ground that it did not sufficiently appear that the execution had directed the sheriff to satisfy the judgment out of the trust property held by the assignee, as required by section 1871 of the Code of Civil Procedure. (*Felt* agt. *Dorr*, 29 *Hun*, 14.)
10. That the fact that proceedings for the settlement of the assignee's account were pending before the county judge of a county other than that in which the order was made, would not have prevented the granting of the order had the issue and return of a proper execution been shown. (*Id.*)
11. The plaintiffs, in supplementary proceedings instituted upon a judgment recovered by them against the defendant Lyons, applied for an order requiring the treasurer of Onondaga county and the treasurer and receiver of taxes of the city of Syracuse, to pay to the sheriff of the said county, to be applied by him upon the plaintiffs' judgment, certain moneys which had been received by them upon the sale of the judgment debtor's real estate for the non-payment of city and county taxes. It was shown upon the hearing that the lands sold were subject to the liens of certain mortgages, given prior to the recovery of the plaintiffs' judgment, and that the owners of the mortgages claimed to be entitled to the said surplus moneys, and had so notified the county and city treasurers: *Held*, that without determining whether or not the lien of the mortgages was destroyed by the tax sales, the right of the plaintiffs to the moneys was "substantially disputed" within the meaning of those words, as used in section 2447 of the Code of Civil Procedure, and that the court properly refused to grant the application. (*Moller* agt. *Wells*, 29 *Hun*, 587.)
12. When, in proceedings supplementary to execution, an order is made requiring the defendant to appear and be examined, and forbidding him from making or suffering any transfer or other disposition of, or interference with, his property, not exempt from levy and sale by virtue of an execution, until the further direction of the court in the premises, he has no right to collect and use wages due to him for services rendered within the sixty days preceding the institution of the proceedings, and is guilty of a contempt of court if he does so. (*Hancock* agt. *Sears*, 29 *Hun*, 96.)
13. If he desire to avail himself of the exemption created by section 2463 of the Code of Civil Procedure, he should make it appear to the court or judge, by his own oath or otherwise, that such earnings are necessary for the use of a family wholly or partly supported by his earnings and apply to have the order modified or annulled in so far as it restrains him from collecting or using the said wages. (*Id.*)
14. It is the duty of the sheriff in making a sale on execution to demand payment for property sold; if not paid, he must then and there avoid the sale and resell or postpone the sale, giving notice thereof. (*Robinson* agt. *Brennan*, 90 *N. Y.*, 208.)
15. If he closes the sale and gives credit or takes anything but money in payment, and delivers the property to the purchaser, what he receives must be treated as money and accounted for by him as such. (*Id.*)
16. Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in

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part before proceedings for contempt can be instituted as provided for in said Code (Secs. 2554, 2555). (*In re Dissotway*, 91 N. Y., 235.)

EXECUTORS AND ADMINISTRATORS.

1. The testatrix, by her will, gave \$1,000 to each of her executors, "in addition to the commissions or allowances they would be entitled to by law," as such executors. After the will had been offered for probate, but before it was actually proved, one of the executors named therein died:

Held, that the deceased executor having accepted the trust and performed acts which showed an intention to assume all the responsibilities and duties of the office, it is sufficient to entitle his representatives to the legacy, although they might not have a legal claim for commissions. (*Scofield* agt. *St. John*, ante, 292.)

2. The testatrix directed that \$8,000 be applied in the purchase of a house and lot in the city of New York, the use of which she gave to her housekeeper during life, and on her death the house to go to the niece of testatrix:

Held, that the clause is valid, and not void as being a naked and inactive trust, as, if the duties imposed are in the nature of a trust, they are not wholly inactive. (*Id.*)

See TRUSTS.

Gilman agt. *McArdle*, ante, 830.

EXPRESS COMPANY.

1. If the Penal Code is susceptible of such a construction as would interfere with the inter-state traffic of an express company, such provisions are unconstitutional and void, because they violate the provisions of the Constitution of the United States, which delegates to

Congress the exclusive power to regulate commerce among the several states. (*Adams Express Company* agt. *Board of Police*, ante, 72.)

2. The court has power, in a proper case, to grant an injunction where the police board threaten to interfere with the business of an express company in the transmission of express matter in transit through the state of New York. (*Id.*)
3. Although an express company would not be justified in transacting its ordinary business or receiving and delivering merchandise on Sunday, yet they may, despite the provisions of the Sunday clause of the Penal Code, carry express matter through the city of New York on Sunday, from the Jersey City ferry to the Grand Central depot, and if the police threaten to interfere the court will grant an injunction to restrain them from such interference. (*Id.*)

FALSE IMPRISONMENT.

1. Where a court has jurisdiction of the subject-matter of the action and of the person, and the papers presented by the attorney are regular upon their face, and the court after consideration, and after hearing and acting judicially upon the papers, grants the application, and the same is afterwards set aside and vacated upon the ground of error in the court, such error of the court is not only a protection to the attorney, but to every other person for acts done under such erroneous process, and the attorney is not liable therefor. (*Fisher* agt. *Langbein*, ante, 382.)

FERRY FRANCHISE.

1. Where land under water has been conveyed by the mayor, &c., of

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New York, "saving and reserving" a portion thereof "for the uses and purposes of public streets, avenues and highways," the grantee takes no substantial right in the part so saved and reserved. It was the intention of the grantors by such clause to retain so much of the land as came within the boundaries of the streets, and it is to be construed in such manner as to carry into effect the intention of the parties. (*Jordan agt. Metropolitan Gas-Light Co., ante, 255.*)

2. The use of land so reserved for a ferry and approach thereto is in accordance with such reservation. (*Id.*)

8. Where a ferry has been established for many years at the foot of a street so reserved, with the acquiescence of the grantees of the land out of which the street is reserved, it is presumed that such ferry was established there by the exercise of lawful authority. (*Id.*)

4. Where ferry property has become unsafe and insufficient for the public needs the city may require the same to be made safe and sufficient. (*Id.*)

5. In such case, where the improvements are to be confined within the limits of the street over which the authority of the street has been retained, the grantee cannot interfere to prevent their being made. (*Id.*)

6. The grantee cannot by erecting piers near the street line restrict or limit the right of the city to provide for the improvement of the street. (*Id.*)

7. The city may delegate to another the right to make improvements in streets which it might itself make. (*Id.*)

8. *Knickerbocker Ice Company agt. Forty-second Street Railroad Com-*

pany, ante, 210, explained and distinguished. (Id.)

FINDINGS OF LAW AND FACT.

1. The rule that an appellate court will presume in support of a judgment in an action tried by the court or referee, that material facts appearing in the case, not embraced in the express findings, were found and considered, applies only to such facts as being found would tend to support the special findings. In respect to inconsistent facts not conclusively established by the evidence, there is no such presumption. (*Armstrong agt. Du Bois, 90 N. Y., 95.*)

2. A refusal of the court to find the several items constituting the sum found due in a foreclosure suit is not error, the general finding covers them, and it is not necessary to state them specifically. (*Sidenberg agt. Ely, 90 N. Y., 257.*)

8. In a creditor's suit it appeared that the execution issued upon the original judgment was returned October 12, 1878; it did not appear when the action was commenced. The summons was dated October twelve, and the complaint was sworn to on that day:

Held, that a finding that the execution was returned before the commencement of the action was justified. (*Murtha agt. Curley, 90 N. Y., 372.*)

HABEAS CORPUS.

1. The supreme court has no jurisdiction on *habeas corpus*, after conviction in criminal cases, to retry questions of fact upon which the correctness of the judgment of the court in which the petitioner was convicted depends; so that the question of the reasonableness or unreasonableness of the ordinance, so far as it depended on questions of fact, passed upon by the police

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justice, could only be reviewed on appeal or writ of *certiorari* by the appellate court having jurisdiction to hear such appeals (*Affirming S. C., 68 How., 845.*) (*Matter of Wright, ante, 119.*)

HARBOR MASTER.

1. Under section 7 of the act of 1862 (*chap. 487*) the harbor master acts *quasi* judicially and has the power to decide whether a vessel is in good faith engaged in discharging its cargo, and whether circumstances require that it should be assigned to another berth. (*Cole agt. Mahoney, ante, 499.*)

HUSBAND AND WIFE.

1. No evidence should be presented to a grand jury which would not be legal and competent at the trial before the traverse jury. (*The People agt. Moore, ante, 177.*)
2. An indictment should be quashed when it appears by affidavit that it was found by the grand jury without adequate evidence to sustain it. (*Id.*)
3. A wife is not a competent witness against her husband, and cannot be called against him by the people without his consent. (*Id.*)
4. Where it appears by affidavit that the wife of a defendant was introduced as a witness before the grand jury without the consent and against the will of the husband (the defendant), and her testimony before the grand inquest being vitally material, the indictment should be set aside. (*Id.*)
5. When the complaint was upon a promissory note made by the defendants jointly, and the defendant P. H. answering alleged simply that at the time of its execution

she was a married woman, and that the note was given for the indebtedness of a third party, one H. S. Hammond:

Held, that the answer was frivolous. It is not a sufficient allegation of coverture to defeat the action. (*Brand agt. Hammond, ante, 264.*)

6. The answer in order to present a defense should have set forth that the defendant was a married woman, and further that the note was not given in the course of her separate business or for the benefit of her separate estates. (*Id.*)
7. The reason of the common-law rule in regard to the joinder of the husband with the wife has wholly ceased to exist; and the rule itself has been abrogated in all cases, of torts as well as contracts, affecting the separate property of a married woman, or connected with or arising from the management or control of her business; and the exemption of a married woman from arrest, which sprang solely from the reason of the rule, has ceased in all cases in which the law expressly authorizes the arrest of females in general terms. (*Muser agt. Miller, ante, 288.*)
8. An attorney for a wife, in an action against her husband, can, by order of the court in the action after settlement by the parties, compel the husband to pay him for services rendered to the wife up to the time of such settlement. (*Chase agt. Chase, ante, 308.*)

See Costs.

Chase agt. Chase, ante, 306.

IMPRISONED DEBTORS.

1. Where it does not appear upon the face of an order for the discharge of an imprisoned debtor whether it was made by the court.

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or by a judge out of court, as the order must in all cases be made by the court, the sheriff is not to be subjected to an action for false imprisonment because he refused to discharge the debtor from imprisonment upon the order, especially after such debtor was advised that the order was defective. (*Hayes* agt. *Bowe*, ante, 347.)

INFANTS.

1. The provisions of section 2851 of the Code of Civil Procedure, by section 3356, did not go into effect until September 1, 1880. (*Matter of Schroeder*, ante, 194.)
2. Instrument deeding infant children must now be recorded within three months after the decease of the grantor to secure and preserve its validity. (*Id.*)
3. The security, good conduct and well being of infant children are the important considerations to be regarded, and where those ends can only be best accomplished by depriving the mother of their custody, it is the uniform practice of the courts to give such a direction. (*Id.*)

INJUNCTION.

1. An injunction should not be granted restraining a railroad from constructing an embankment on its own land, which is necessary to make its road-bed safe, because such embankment has already slipped and is liable to further slip on plaintiff's land and ruin a spring. (*Rider* agt. *New York, West Shore and Buffalo Railway Co.*, ante, 419.)
2. A temporary injunction is unauthorized when it does not appear from the complaint that plaintiff is entitled to the final relief for which the action is brought (*Code*

of Civil Procedure, sec. 608). *McHenry* agt. *Jewett*, 90 N. Y., 58.)

3. The granting of the injunction in such case is error of law which may be reviewed in this court on appeal (*Code of Civil Pro.*, sec. 190, sub. 2). (*Id.*)
4. It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened, there must be some special ground of jurisdiction, and where an injunction is the final relief sought, the facts entitling the plaintiff to it must be averred in the complaint (*Id.*)
5. Where in an action to restrain the infringement of a trade-mark it is shown that defendant has in his store, and offers for sale, a spurious article, with an imitation of plaintiffs' trade-mark thereon, although but a single sale is proved, it is sufficient to sustain an injunction against a continuance of the wrong. (*Low* agt. *Hart*, 90 N. Y., 457.)
6. An action for such injunction will not be defeated solely on the ground that on the day it was brought defendant happened not to have any of the article on hand. (*Id.*)
7. Costs in such an action are in the discretion of the court. (*Id.*)
8. The court has power, in a proper case, to grant an injunction where the police board threaten to interfere with the business of an express company in the transmission of express matter in transit through the state of New York. (*Adams Express Co.* agt. *Board of Police*, ante, 72.)
9. Where plaintiff asks an injunction to restrain defendant from trespassing on land, in which the plaintiff has a certain interest, by doing certain things which he has

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- no right to do as between the parties, and which are prejudicial to that interest, his prayer will not be denied, by reason of the fact that he himself is, so to speak, a trespasser, as to the defendant's certain other interests in the same lands, by doing certain things which, as between the parties, he has no right to do, and which are prejudicial to the defendant's interests; but on granting the injunction prayed for he will also be enjoined; and if his trespass be in whole or in part the erection of structures, he will be required to remove them. (*Knickerbocker Ice Co. agt. Forty-second St. and Grand St. Ferry R. R. Co., ante, 210.*)
10. It is a condition precedent to the right of a judge to act under the amendment of 1888 to section 629 of the Code of Civil Procedure, that he should be satisfied that the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money. Affidavits which are but expressions of opinion not furnishing the court with any facts upon which it can determine for itself whether the alleged wrong or injury is not irreparable, and whether it "is capable of being adequately compensated for in damages," are insufficient. (*Metropolitan Elevated Railroad Co. agt. Manhattan Railway Co., ante, 277.*)
11. The fair and reasonable interpretation of the amendments to this section of the Code is, that the application for the vacation of the injunction should be made to the court or judge who hears the application to vacate or modify the injunction order. (*Id.*)
12. Did the legislature intend that the injunction should be vacated where the court, after hearing both parties, had determined that the alleged agreement, the execution of which the injunction was designed to restrain, is absolutely null and void. *Quære?* (*Id.*)
13. Upon an application to vacate the injunction restraining the carrying out of the "merger agreement" upon filing the undertaking provided for under the new amendment of section 629 of the Code of Civil Procedure:
- Held, first*, that as the defendants were required by the order served upon them to show cause why the injunction therein granted provisionally or *ad interim* should not be continued during the pendency of the action, and as they appeared upon the return day of this order and opposed the application, their so appearing and opposing must, within the meaning of the provision of the recent amendment to this section, be regarded as having the same force and effect as if they had applied upon notice to vacate the injunction.
- Second*. As the motion of the plaintiff to continue the *ad interim* injunction until the trial and judgment is, though argued, still under consideration, the application of the defendants now to vacate the injunction upon filing the undertaking provided for by the statute is, within the meaning of the new amendment, application "upon the hearing."
- Third*. The alleged wrong and injury complained of is capable of being adequately compensated for in money, as it is the withholding from the Metropolitan road of the quarterly payments provided for in the original lease made by the directors, with the approval of the stockholders, and consists in the difference between the amount payable quarterly under that lease and the reduced amount payable quarterly under the October agreements, which reduced amounts the Manhattan company have so far offered to pay. The extent, therefore, of the injury which the plaintiffs can sustain by vacating the injunc-

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tion is the amount of that difference from the time of the service of the injunction until the action can be tried and the rights of the parties finally determined by a judgment.

Fourth. An undertaking, therefore, sufficient to cover the amount of this difference from the service of the injunction to the first of January next, which difference it is agreed would amount to \$196,000, is the proper measure of the plaintiffs' loss up to that period, and sufficient within the provisions of the new amendment to secure to the plaintiffs adequate compensation in money for any injury they may sustain by the vacating the injunction. (*Metropolitan Elevated Railroad Co. agt. Manhattan Railway Co., ante, 319.*)

14. The amendment makes no distinction between injunctions *ad interim* and injunctions *pendente lite*. When the indemnity contemplated by the statute is given it puts an end alike to the injunction *ad interim* and to the motion to continue it while pending and undecided (*See, also, Metropolitan Elevated Railway Co. agt. The Manhattan Railway Co., opinion by LAWRENCE, J., ante, 277.*) (*Id.*)

15. The court has power, notwithstanding the pendency of the appeals in the court of appeals, to vacate the injunction orders upon defendants executing undertakings as provided by this new amendment of section 629 of the Code of Civil Procedure, if proper and sufficient grounds are presented. (*Williams agt. Western Union Telegraph Co., ante 326.*)

16. But when, as in these cases, the general term has decided that the distribution, without consideration, of a large amount of stock was in violation of positive law, and consequently the payment of dividends on such stock, would be illegal, and that plaintiffs have a sufficient standing in court to

call for the enforcement of the law, they do not fall within the class of actions contemplated by the amendment. (*Id.*)

17. No court has any right or power upon an offer by a corporation to indemnify a few individuals against pecuniary loss, to grant in effect permission to such corporation to continue to violate the law of the land (*See, also, Metropolitan Elevated Railway agt. The Manhattan Railway Company, ante, 277; and Metropolitan Elevated Railroad Company agt. The Manhattan Railway Company and The New York Elevated Railroad Company and others, ante, 319.*) (*Id.*)

18. Where, in an action brought under section 1638 of the Code of Civil Procedure to compel the determination of a claim to the property adverse to that of the plaintiff, it appeared that the defendant was actively interfering with the possession by plaintiff of the premises in controversy, an injunction may be issued under section 608, and that immediately following it. (*Stamm agt. Boswick, ante, 358.*)

INSURANCE (LIFE).

1. On February 28, 1866, upon the application of B. to F., the general agent of the Globe Mutual Life Insurance Company at Poughkeepsie, such insurance company issued its policy of insurance No. 1,877, whereby, in consideration of the sum of \$328.60 then paid, and the payment of a like sum on or before February twenty-eighth, in each and every year thereafter, it insured the life of said B. for the benefit of his wife and surviving children. On March 1, 1871, on application of B., policy No. 1,877 was exchanged for registered policy No. 1,891, containing the same conditions. On February 28, 1879, F., the general agent of the company, according to his

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custom charged B. with the annual premium, crediting the company with the payment to himself of such premium. On March 31, 1879, F. died, and after his death B. called at the office of the company in New York and was told that the policy had lapsed by reason of the non-payment of the premium of February 28, 1879, but that if he would not assent to a re-examination they would give him a paid-up policy for four years. B. signed in his own name and that of his wife a written surrender of the policy. On the next day the company sent a messenger to Poughkeepsie with a paid-up policy and took from B. and wife a surrender of the policy, they signing the same for themselves and as guardian of W. F. B., their infant child. The signature to such surrender and acknowledgment of execution were made in the city of Poughkeepsie to one C. B., a notary public appointed for and residing in the city and county of New York. The claim founded upon policy 1,891 has been duly presented to the receiver within the time limited for that purpose:

Held, 1st. That the policy did not lapse by reason of the non-payment of the premium due February 28, 1879. As between the insured and the company it was paid on the day it was due. The company had a credit for the amount thereof on the books of their agent.

2d. No step has been taken to forfeit the policy as required by chapter 321 of the Laws of 1877; and without giving the notice as required by said act there could be no forfeiture.

3d. The attempted surrender by B. was ineffectual. The insurance was for the benefit of his wife and children, and he had no authority in fact, and of such fact the company was informed, to execute the surrender for his wife.

4th. The surrender by the wife was ineffectual as the statute (3 R.

S. [1st ed.], 162, sec. 911) requires it to be acknowledged in the same manner as a release of dower. The notary who took the acknowledgment was an officer appointed for and residing in New York and could not execute its duties in Poughkeepsie. (*The People* agt. *Globe Mutual Life Ins. Co.*, ante, 239.)

2. The resistance to this claim by the receiver being upon reasonable grounds and in good faith no costs should be allowed against him. (*Id.*)

3. Chapter 398 of the Laws of 1883, does not affect the fees of a receiver appointed previous to its passage, under chapter 902 of the Laws of 1869. (*The People* agt. *McCall*, ante, 442.)

4. When the services of an officer has been completed, and the work done on the faith of fees prescribed by a statute in force at the time of his appointment, a law which changes the amount to be paid for similar services should not be held applicable to it, unless expressly and plainly so declared. (*Id.*)

JUDGMENT.

1. Where issues have been litigated in a former action, they cannot be retried in another between the same parties upon allegations that fraud, perjury and conspiracy have been committed by the prevailing party and his witnesses. (*New York Central Railroad Co.* agt. *Harrold et al.*, ante, 89.)

2. Although it is a legal principle well established, that where a judgment has been obtained by fraud, conspiracy and perjury, that equity will interfere to restrain its enforcement, still, like other general principles, this must be taken to apply to a case where proof of such fraud, perjury and conspiracy is admissible. (*Id.*)

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8. Therefore, when it appears that the same matter has actually been tried, the party is estopped to set up such fraud and crime, because the judgment is the highest evidence and cannot be contradicted. (*Id.*)

4. The subsequent repeal of a statute does not impair the binding force or validity of a judgment recovered prior to such repeal. (*Cole agt. Mahoney, ante, 499.*)

5. A judgment against a bankrupt will not be discharged under section 1268 of the Code of Civil Procedure where it appears by affidavit that the judgment was recovered not against defendant alone, but jointly with another and is not the judgment covered by the discharge of the bankrupt, and that plaintiff had no knowledge, actual or constructive, of the bankruptcy proceedings, that he was not named in the proceedings as a creditor and that the omission of the name of plaintiff as a creditor and substitution of a similar name was with fraudulent intent. (*Seaman agt. McReynolds, ante, 521.*)

See ACTION.

Roach agt. Duckworth, ante, 303.

6. In an action brought by a judgment creditor against the debtors and their assignee to set aside a general assignment as fraudulent, a judgment was entered on October 17, 1878, declaring the assignment to be void as to creditors, directing it to be set aside and requiring the assignee to account for the value of the property received by him and pay the same over to a receiver to be appointed, who was directed to apply the moneys so to be received as was in said judgment directed. Thereafter, and on January 31, 1879, an order was made confirming the report of a referee stating the account of the assignee, and requiring the assignee to pay over certain sums of

money specified in the order to the receiver and other persons therein designated. On March fourteenth an order purporting to be made upon the motion of the receiver was entered. It did not recite that notice had been given to the assignee, but stated that after demand made he had neglected and refused to pay the moneys mentioned in the order. It directed that a precept issue to commit him to the county jail until he paid the amounts named: *Held*, that under the circumstances of the case the court had no power to issue process against the assignee's person until an execution had first been issued against his property, and that the invalidity of the process might be set up, by one who signed the bail bond with the assignee, in an action brought upon the bond for the latter's escape. That the provisions of section 4 of 2d Revised Statutes, 585, to the effect that "when any rule or order of the court shall have been made for the payment of costs or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison," apply only to orders strictly interlocutory. That the order of January 13, 1879, was not an interlocutory order. (*Meyers agt. Becker, 29 Hun, 567.*)

7. One who has acquired title to a judgment of a court of this state by virtue of an assignment from a foreign administrator of the judgment creditor, may maintain an action thereon in his own name, without first procuring leave from the court so to do. (*Carpenter agt. Butler, 29 Hun, 251.*)

JUDGMENT DEBTOR.

1. An affidavit to obtain an order for the examination of a judgment

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debtor in aid of execution, which states as a ground for such examination "that as deponent is informed and believes the said defendant has property which he unjustly refuses to apply towards the satisfaction of the judgment," is insufficient to authorize the order. (*Manken et al. agt. Pope, ante, 453.*)

2. An affiant should give the name of his informant with his means of knowledge, and shall describe the property and also allege a demand. (*Id.*)

JUDICIAL SALE.

1. It is the duty of the sheriff in making a sale on execution to demand payment for property sold; if not paid, he must then and there avoid the sale and resell or postpone the sale, giving notice thereof. (*Robinson agt. Brennan, 90 N. Y., 208.*)
2. If he closes the sale and gives credit or takes anything but money in payment, and delivers the property to the purchaser, what he receives must be treated as money, and accounted for by him as such. (*Id.*)

JURISDICTION.

1. The court has power, in a proper case, to grant an injunction where the police board threaten to interfere with the business of an express company in the transmission of express matter in transit through the state of New York. (*Adams Express Company agt. Board of Police, ante, 72.*)
2. Surrogates have power, under the Code of Civil Procedure, to hear and determine controversies in regard to the title to, or any question concerning a legacy or distributive share under a will. (*Matter of Brown' ante, 387.*)

3. Where crimes are defined in the Penal Code, and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in section 15 of such Code is proper. (*Matter of Hallenbeck, ante, 401.*)

4. The court of special sessions of the city of Albany have jurisdiction to impose a fine of \$500 upon a person convicted of petit larceny. (*Id.*)

5. The district courts have no jurisdiction in actions to recover penalties fixed by the dock department for neglect to remove merchandise from a dock or pier. (*The Mayor agt. Decker, ante, 472.*)

JURORS.

1. Section 18 of article 3 of the Constitution (as amended in 1874) provides that the legislature shall not pass a private or local bill in certain enumerated cases. Section 25 of same article declares that said section 18 shall not apply to any bill, or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes:

Held, that the legislature cannot pass a local bill in any one of the enumerated cases unless reported to it by the commissioners to revise the statutes. (*The People agt. Petrea, ante, 59.*)

2. Whenever a question arises as to the constitutionality of a statute the courts may resort to any source of information which in its nature is original evidence of any fact relevant to the inquiry, but the motives of the legislature in passing a particular statute is irrelevant. (*Id.*)

3. The journals of each branch of the legislature and the original act

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are competent evidence upon the issue whether a particular law has been constitutionally passed. (*Id.*)

4. An amendment of an existing local law regulating the selection of petit jurors which simply transferred the power of selection from one local officer, or set of officers, to another local officer is constitutional. (*Id.*)

5. In this case the defendant was indicted for a felony by a grand jury which was drawn from names selected under an unconstitutional law, and objection on that ground was taken by him before plea of not guilty:

Held, that such grand jury was a *de facto* one, and the invalidity of the law affected none of his substantial rights, and therefore there was no violation of the constitutional guaranty (*art. 7, sec. 10*) that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. (*Id.*)

6. If a defect in the organization of a grand jury is such as to deprive it of its character as a grand jury in a constitutional sense, the court is bound to take notice of the defect, although no statute authorized it, or even if a statute assumed to preclude the raising of the objection. But when the defect is not of that character the question is one of procedure merely, subject to regulation by the legislature. (*Id.*)

7. The Code of Criminal Procedure provides no way whereby a defendant can make the objection to a grand jury, that it was drawn from names selected pursuant to the provisions of an unconstitutional law. (*Id.*)

8. The Code of Criminal Procedure controls as to every indictment found after it went into effect, whether the crime charged

was committed before or after that time (*Affirming S. C., 64 How., 139.*) (*Id.*)

9. Chapter 532 Laws of 1881, amending section 1041 of the Code of Civil Procedure, in so far as it provides for the selection of grand jurors in and for the city of Albany, is unconstitutional. (*The People agt. Duff, ante, 365.*)

10. When objection is made to the impanneling of grand jurors under such law it must be sustained. (*Id.*)

11. A grand jury obtained by methods which the constitution forbids cannot be a valid grand jury under the constitution. (*Id.*)

12. Valid objections made to a grand jury before its organization, but then reserved and not decided, and renewed after indictment, must be held effectual to quash the indictment. (*Id.*)

JURY.

1. It is a well understood and well settled rule that the affidavits or declarations of jurors cannot be received to impeach their verdict. (*Ostrander agt. People, 28 Hun, 38.*)

JUSTICES' COURT.

1. Under the provisions of the Code of Procedure (*subd. 15, sec. 64*), as amended in 1860, authorizing the defendant in an action in a justice's court, to make an offer of judgment "on the return of process and before answering," and upon acceptance thereof by plaintiff authorizing the justice to render judgment accordingly, the words "on the return of process" do not limit the authority to the return day specified in the process, but it may be exercised immediately after service and actual re.

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turn thereof. (*Fowler* agt. *Haynes*, 91 N. Y., 846.)

2. Where, therefore, upon the same day of the issuing of a summons by a justice of the peace, but after its service and actual return by the constable with proper certificate of service, the parties appeared by attorneys who duly swore to their authority to so appear, and plaintiff's attorney filed his complaint in writing, whereupon defendant's attorney made an offer in writing to allow judgment for the amount claimed in the complaint, which was accepted and judgment entered accordingly: *Held*, that the judgment was valid; also *held*, that authority to defendant's attorney to appear for her empowered him to make the offer of judgment, and that, therefore, it was not necessary, in addition to swearing to authority to appear generally, that he should have sworn to authority to make the offer. (*Id.*)

JUSTICE OF THE PEACE.

1. The plaintiff discontinued an action brought in a justice's court for a trespass upon lands, upon a plea of title, and a general denial being interposed by the defendant. Thereafter he brought this action for the same cause, and the same defenses were again pleaded. Upon the trial the plaintiff having given no evidence to prove the trespass alleged in the complaint, the court, on motion of the defendant, dismissed the complaint: *Held*, that there was no "trial of an issue of fact," within the meaning of those terms as used in the exception contained in section 8235 of the Code of Civil Procedure, and that the defendant was entitled to costs. (*Gates* agt. *Canfield* 28 Hun, 12.)
2. That even if the act were invalid, yet until the title of one acting as a justice of sessions had been de-

clared invalid in a proceeding by *quo warranto*, the legality of a court of oyer and terminer, of which he was a member, could not be assailed upon a motion to have the court fix a day for the execution of a prisoner, under a sentence imposed in pursuance of a judgment which had been affirmed by the general term upon a writ of error. (*Ostrander* agt. *People*, 29 Hun, 513.)

3. A court of oyer and terminer held by a justice of the supreme court, without an associate, as authorized by section 23 of the Code of Criminal Procedure, as amended by chapter 860 of 1882, may fix a day for the execution of a sentence, imposed by a court of oyer and terminer which had been held by such a justice and two justices of sessions prior to the passage of the said amendment. (*Id.*)
4. Upon a motion to have the court fix a day for the execution of a sentence of death, pronounced in pursuance of a judgment which had been affirmed by the general term, the prisoner's counsel moved to have the court refuse to fix the day, upon the ground that the court of oyer and terminer before which the prisoner was tried was illegal and improperly constituted: *Held*, that the Code of Criminal Procedure did not authorize an appeal from an order denying the prisoner's application and fixing a day for the execution of the sentence. (*Id.*)

LEASE.

1. A contract under seal may be explained by parol evidence to vary its apparent expression, showing it was not the intention of the parties to do as written, when the words are capable of two different constructions: (*Heilman* agt. *Lazurus*, ante, 15.)
2. Where a lease was made contain-

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ing a clause for the purchase of the property "as per special agreement signed in the same time with this lease," it is competent to show by parol evidence that the said clause is the special agreement referred to, and that no other or separate paper was to be signed at the same time. It is competent for the jury to find that no further agreement was contemplated at the time of the execution of the lease, and that the lease was a complete and perfect contract. (*Id.*)

8. The burden of the proof on the plaintiff is that of title and right of possession to the land; this makes a *prima facie* case. It is not error to charge the jury that the lease is in form complete and signed by the parties, and it is needful for the defendant to establish his defense satisfactorily. This is not charging that the burden of proof is upon defendant to impeach the lease, nor is the burden of proof shifted; it only means "there is necessity of evidence to answer the *prima facie* case or it will prevail." (*Id.*)

4. Where the subject matter involved was the right of possession of real estate for two years subject to the rent reserved, and no money value of the right is shown, there is no basis for computation of an extra allowance. (*Id.*)

LEGACY.

See WILK.

Cook et al. agt. Munn, ante, 514.

LIMITATION OF ACTIONS.

1. The plaintiff brought this action against the city of New York to recover the damages sustained by reason of her slipping and falling upon ice or snow, negligently, carelessly and wrongfully suffered to be and remain upon a crosswalk in the city, by the defendant: *Held*, that the action was to

recover damages "for a personal injury resulting from negligence" within the meaning of section 383 of the Code of Civil Procedure, and must be brought within three years after the cause of action accrued. (*Dickenson agt. Mayor, 28 Hun, 254.*)

2. Section 105 of chapter 885 of 1878 provides that "no action shall be maintained against the mayor, aldermen and commonalty of the city of New York, unless the claim on which the action is brought has been presented to the comptroller, and he has neglected for thirty days after such presentation to pay the same." Section 410 of the Code of Civil Procedure provides that where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete: *Held*, that the statute of limitations began to run upon a claim against the city thirty days from the time when the demand might reasonably have been made to the comptroller. (*Id.*)

8. On July, 16, 1878, the plaintiff commenced an action in a justice's court upon a claim which accrued in August, 1872. The action was adjourned to October seventeenth. On that day the parties appeared before the justice and entered into a written stipulation to submit the matters in difference to an arbitrator named therein, and on the hearing before the arbitrator to waive the statute of limitations. Thereupon the action was discontinued. The next day the defendants' intestate revoked the submission, and thereafter, and in the following March, died. Upon the plaintiff seeking to enforce the payment of the claim from the defendants they pleaded the statute of limitations: *Held*, that the agreement to waive the statute on the hearing before the arbi-

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trator was a sufficient written acknowledgment of the debt to remove the bar of the statute. (*Anderson* agt. *Sibley*, 28 *Hun*, 16.)

MANDAMUS.

1. The costs to be allowed, and which are recoverable upon an appeal from an order granting a peremptory *mandamus* when such order is affirmed, is regulated by section 8240 of the Code of Civil Procedure, and in the discretion of the court, are the same costs which are given on "an appeal from a judgment." (*People ex rel. Bray et al.* agt. *Board of Supervisors of Ulster County*, ante, 327.)
2. The relator applied for a writ of *mandamus*, commanding a justice of the marine court to entertain an application for summary proceedings to remove a tenant from demised premises for the non-payment of four dollars and fifty cents as rent. From the return of the justice it appeared that the application was denied because his time was required for and devoted to other business having precedent demands upon him as a member of the court: *Held*, that the court properly refused to order the writ to issue. (*People ex rel. Cavanagh* agt. *McAdam*, 28 *Hun*, 284.)

MANUFACTURING CORPORATION.

1. A complaint in an action against two out of three trustees of a manufacturing corporation, for a failure to file the annual report is not demurrable on the ground of a defect of parties defendant. (*Bothford* agt. *Dodge*, ante, 145.)
2. An allegation that the corporation is duly organized and existing, does not allege the existence of any number of trustees, although the statute requires three or more. (*Id.*)

MARRIAGE.

1. While a belief in spiritualism is not *per se* sufficient for setting aside a marriage and a conveyance of property, yet where a shrewd, designing, lewd and unchaste woman, in middle age, knowing that an old man who is deaf and living in seclusion is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance, pretends to be a medium and to receive communications from spirits commanding that they marry and that the old man convey to her valuable property, claims to be a clairvoyant physician and to be able to cure his deafness, and by other fraudulent devices induces the old man to marry her and to convey to her the property, the marriage and conveyance will be set aside as procured by fraud and undue influence when the court is satisfied from all the evidence they were so procured. (*Hides* agt. *Hides*, ante, 17.)

MASTER AND SERVANT.

See NEGLIGENCE.

Crowley agt. *Palen*, ante, 485.

MECHANIC'S LIEN.

1. A verification to a mechanic's lien that the statements therein contained were true to the best of the affiant's information and belief is insufficient, and as the lien in such case fails, the court cannot entertain the proceeding for the purpose of granting a personal judgment. (*Childs* agt. *Bostwick*, ante, 146.)

MORTGAGE FORECLOSURE.

1. Where, in a foreclosure action in which the defendant interposed the plea of usury and plaintiff had

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judgment in his favor at special term, the general term directed a retrial, with a submission to a jury of the question of usury, the fact subsequently set up by amended pleadings that since the joining of issue the mortgagor had sold his interest in the mortgaged premises, and had also been adjudicated a bankrupt, did not change the legal *status* of the parties, and the question of usury must be submitted to a jury for trial. (*Devlin* agt. *Shannon*, ante, 148.)

2. A mortgage for \$100,000, executed by A. and his wife to plaintiffs, as mortgagees, covered property of the wife as well as that belonging to her husband. The bond, which was joint and not several, was executed by A. and B., but not by the wife of A. Of the \$100,000 thus loaned \$28,250 was used to pay a debt to C., for which the latter had a specific lien upon the separate property of Mrs. A., which lien was relinquished by such payment. The mortgage was not paid at maturity, and in 1875 and 1876 the mortgagees received from A. several promissory notes, aggregating \$80,000, payable to his order and indorsed by him. The receipt given for the notes contained these words: "Each note to be applied to the redemption of bond dated September 5, 1873, at maturity, if paid:"

Held, 1st. That conceding that in equity, as to the amount secured by the mortgage over and above what was used of the moneys realized thereon to relieve her separate property, Mrs. A. occupied, through the mortgage upon her separate estate, the attitude of surety only, yet her property was not released by the acceptance of the promissory notes, the payment of the mortgage debt not having in fact been extended thereby, the notes not having been sold or discounted.

2d. Neither did A. occupy the position of surety, although the bond was joint and not several,

and his property and estate were not discharged by his death, he having been liable for the payment of the debt to C., which was paid out of the moneys advanced by the mortgagees.

3d. The omission of the plaintiff to serve a reply to such parts of the answer as set up payments upon the mortgage is not to be considered an admission that such payments were made. (*Scott* agt. *Stockwell*, ante, 249.)

3. Judgment of special term affirmed by general term (28 *Hun*, 641). (*Id.*)

MOTIONS AND ORDERS.

1. Under the provision of the Code of Civil Procedure (*sec.* 1421), providing that where an action is brought against an officer or one acting under him, to recover a chattel levied upon by attachment or execution, or to recover damage for such levy, etc., if a bond indemnifying the officer against the levy was given, the obligors may, upon application, be substituted as parties defendant, it is not requisite in order to authorize the substitution that the bond should have been given prior to the levy. It is sufficient if it appears that it was given upon claim being made by plaintiff to the property levied upon. (*Hessberg* agt. *Riley*, 91 *N. Y.*, 377.)
2. Upon motion for such substitution the plaintiff may not be heard to object, that notice of the motion was not served upon the officer who made the levy, as he does not represent that officer. (*Id.*)
3. *It seems*, that the motion being made for the benefit of the officer it is to be presumed that he has notice; and, when he does not object, that he assents to the proceeding. (*Id.*)

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4. The amount claimed in such an action was \$2,000; the undertaking was for \$1,000: *Held*, that it was a matter in the discretion of the court below whether to require additional security and that the difference did not authorize a refusal of a motion to substitute the sureties. (*Id.*)

5. Where, upon motion for a peremptory writ of *mandamus*, the defendant reads affidavits justifying his action, and controverting the allegations of the relator, and the latter, without introducing further papers or asking for an alternative writ, proceeds to argument, this is equivalent to a demurrer, and he cannot complain if the court pass upon the motion instead of ordering an alternative writ. (*People ex rel. Hartford L. & An. Ins. Co.*, agt. *Fairman*, 91 N. Y., 855.)

6. After a decision denying such motion, a motion on the part of the relator to modify the order so as to permit an alternative writ to issue is addressed to the discretion of the court, and its decision thereon is not reviewable here. (*Id.*)

MUNICIPAL CORPORATION.

1. *Municipal corporation*, when it is the grantor of the common grantor, and its only interest is that of performing a public duty, the requirements for the performance of the covenants must be in the discharge of its public duty, and in conformity with the covenants or the requirements of an authorized improvement. (*Knickerbocker Ice Co.* agt. *Forty-second St. and Grand St. Ferry R. R. Co.*, ante, 210.)

NATIONAL BANK.

1. Every action against a national bank is an "action arising under the laws of the United States,"

and as such is removable to the circuit court of the United States under section 2 of the removal act of 1873. (*Cruikshank* agt. *Fourth National Bank*, ante, 280.)

NEGLIGENCE.

1. Where willful trespass is committed, the question of negligence does not arise. (*Brown* agt. *Moran*, ante, 349.)

2. In an action brought by plaintiff for the wrongful killing of her son while crossing a public street in the city of New York by a horse driven by a person in the employment of the defendants, the horse taking fright from the passage of a train on the elevated railway, it appeared that the horse was taken to the same locality by the same driver on the preceding day and he then became frightened by the passage of a train on the elevated railway, the complaint was dismissed upon the sole ground that defendants had not been guilty of negligence:

Held, that when the horse became frightened by the passage of the train on the day preceding the accident, that was a circumstance from which it might well be inferred that he would be affected in the same manner whenever he should be taken to the same place again, and with that probability being known to the person who had charge of the horse, the point is by no means clear that he could be exonerated from the imputation of negligence when he exposed the horse to the same cause a second time. (*Crowley* agt. *Palen*, ante, 435.)

3. What the law required from him was, that he should observe that degree of care and attention that experienced, careful and prudent persons would be expected to observe under similar circumstances when the entire risk of injury would rest upon themselves. (*Id.*)

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4. Whether this degree of care and attention was consistent with a second exposure of the horse to the object which had previously frightened him, was a question for the determination of the jury. It was a matter of inference to be deduced from the attendant circumstances, and what inference should be drawn it was the province of the jury to decide. (*Id.*)
5. The fact that the horse was frightened on the preceding day while he was being driven by the defendants' servant was constructive notice to them of the occurrence itself. If he was negligent the law imputes the same degree of negligence to them whose servant he was. (*Id.*)
6. Where the circumstances shown by the evidence are such that the jury may logically infer the existence of misconduct involving a want of reasonable care or negligence, the case should not be withdrawn from their consideration. (*Id.*)
7. The jury was apparently the result of a mere inadvertence, which was not shown to have worked harm to the defendant, it furnished no cause for setting aside the verdict. *It seems*, that this section refers to an adjournment from day to day, or for a longer time, and not to a recess taken during a single day's session. (*People* agt. *Draper*, 28 *Hun*, 1.)
8. The action of a jury in getting possession while deliberating upon their verdict, of a copy of the Revised Statutes, or of any other book containing statements of law as to the crime set forth in the indictment, although irregular, will not vitiate the verdict unless it be shown that the defendant was prejudiced thereby. The fact that the officers sworn to attend a jury were in the same room with them during their deliberations is not a ground for granting a new trial. The practice is not, however, to be approved of. (*Id.*)

NEW TRIAL.

1. Upon a trial by jury the trial judge may, in a proper case, award a new trial upon a dismissal of the complaint. (*Pollock* agt. *Wannemaker*, ante, 508.)
2. Section 415 of the Code of Criminal Procedure provides that "the jury must, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves on any subject connected with the trial, or to form or express an opinion thereon until the cause is finally submitted to them." The defendant moved for a new trial on the ground that the court omitted, on taking a recess for dinner, to admonish the jury as required by that section: *Held*, that as the omission to charge
4. The court at general term cannot entertain a motion for a new trial upon the merits, or on the ground of newly discovered evidence. (*Ostrander* agt. *People*, 28 *Hun*, 38.)

NEW YORK (CITY OF).

1. The grantor, owning the lands under water on the side of the pier, an easement therein to a reasonable distance will pass to the grantee. (*Knickerbocker Ice Co.* agt. *Forty-second St. and Grand St. Ferry R. R. Co.*, ante, 210.)
2. The first deed being recorded, the latter is subject to the easement thereby created. (*Id.*)
3. Covenants running with the land, is to be performed by a common grantor, when so required, in a required manner. (*Id.*)
4. The performance of the cove-

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- nants by a grantor of a portion of the land in which there is an easement in favor of a grantee of another portion, may have the effect of destroying the easement. (*Id.*)
5. It will have such effect when the grantor of the common grantor has a legal interest in the performance of the covenant, and requires performance in the prescribed manner. (*Id.*)
 6. *Municipal corporation*, when it is the grantor of the common grantor, and its only interest is that of performing a public duty, the requirements for the performance of the covenants must be in the discharge of its public duty, and in conformity with the covenants or the requirements of an authorized improvement. (*Id.*)
 7. Where plaintiff asks an injunction to restrain defendant from trespassing on land, in which the plaintiff has a certain interest, by doing certain things which he has no right to do as between the parties, and which are prejudicial to that interest, his prayer will not be denied, by reason of the fact that he himself is, so to speak, a trespasser, as to the defendant's certain other interests in the same lands, by doing certain things which, as between the parties, he has no right to do, and which are prejudicial to the defendant's interests; but on granting the injunction prayed for he will also be enjoined; and if his trespass be in whole or in part the erection of structures, he will be required to remove them. (*Id.*)
 8. Where land under water has been conveyed by the mayor, &c., of New York, "saving and reserving" a portion thereof "for the uses and purposes of public streets, avenues and highways," the grantee takes no substantial right in the part so saved and reserved. It was the intention of the grantors by such clause to retain so much of the land as came within the boundaries of the streets, and it is to be construed in such manner as to carry into effect the intention of the parties. (*Jordan* agt. *Metropolitan Gas-Light Co.*, ante, 255.)
 9. The use of land so reserved for a ferry and approach thereto is in accordance with said reservation. (*Id.*)
 10. Where a ferry has been established for many years at the foot of a street so reserved, with the acquiescence of the grantees of the land out of which the street is reserved, it is presumed that such ferry was established there by the exercise of lawful authority. (*Id.*)
 11. Where ferry property has become unsafe and insufficient for the public needs the city may require the same to be made safe and sufficient. (*Id.*)
 12. In such case, where the improvements are to be confined within the limits of the street over which the authority of the street has been retained, the grantee cannot interfere to prevent their being made. (*Id.*)
 13. The grantee cannot by erecting piers near the street line restrict or limit the right of the city to provide for the improvement of the street. (*Id.*)
 14. The city may delegate to another the right to make improvements in streets which it might itself make. (*Id.*)
 15. *Knickerbocker Ice Company* agt. *Forty-second Street Railroad Company* (ante, 210) explained and distinguished. (*Id.*)
 16. A regular clerk of a department of a city government, whom it is proposed to remove, has the right to be represented by counsel in making the explanation provided

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by section 28, chapter 835, Laws of 1878, on being informed of the cause of the proposed removal. (*Matter of Emmet, ante, 266.*)

17. The placing of poles necessary for the purpose of bearing the wires which transmit the electricity to the electric lamps for lighting the streets, is among the public uses to which a street may properly be devoted. (*The People ex rel. McManus agt. Thompson, ante, 407.*)

18. It is the manifest purpose of all the legislation upon the subject to put the responsibility of assessment, namely, the fixing of the value of property for taxation, in the city of New York, upon the tax commissioners alone. (*McMahon agt. Beekman, ante, 427.*)

19. The day when the assessment must be deemed to be made, and be final (except in cases of amendments and correction of mistakes specially provided by statute), is the second Monday of January in each and every year. (*Id.*)

20. Although the machinery necessary to secure revenue from personal property has necessarily to act upon the individual, it is the property itself, and not the person that bears the tax, and the change of ownership, or condition of the individual relatively to the property, after the value is fixed, cannot operate to relieve the property from the tax. (*Id.*)

21. Where a party died, June twenty-second, after the time when the annual record was placed in the hands of the tax commissioners (*i. e.*, second Monday of January) and after it was closed against correction (*i. e.*, first day of May), but before the delivery of the rolls by them to the board of Aldermen (*i. e.*, July first):

Held, that the assessment of his personal estate was completed before his death, and consequently a

recovery for such tax could be had against his executors. (*Id.*)

NOTARY PUBLIC,

See INSURANCE (LIFE).

The People agt. Globe Mutual Life Insurance Company, ante, 239.

OFFICE AND OFFICER

1. Under section 1953 of the Code of Civil Procedure, by proceedings in the action subsequent to final judgment upon the right and in favor of the person alleged to be entitled to the office, the person thus found entitled to the office may recover in the same action against the defendant the damages which he has sustained in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office. (*The People ex rel. Swinburne agt. Nolan, ante, 468.*)

2. Upon such proceedings in the action, though subsequent to the verdict and judgment upon the title to the office, the defendant is entitled to a hearing and trial. (*Id.*)

3. Section 1956 in terms authorizes the court to impose in an action of this character, a fine, but to justify the imposition, the court should have before it evidence showing that the defendant has been guilty of some act in taking or holding the office from which he has been evicted, which was criminal, or, at least, grossly improper. (*Id.*)

4. It was assumed in the enactment of section 1956 that the evidence given upon the trial of the action would place the court in possession of all the facts upon which it would act, and if the proof given upon the trial shows nothing to justify the imposition of a fine, there is no procedure given to supply the omission. (*Id.*)

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See ALBANY (CITY OF).

Kehn agt. *The State*, ante, 488.

5. Where, after an action has been brought by a supervisor of a town, under section 1926 of the Code of Civil Procedure, his term of office expires, it is only "in a proper case" that the court will, upon the application of his successor, substitute him in the place of the original plaintiff. Where it appears from the relation existing between the defendant and the new supervisor, and the attitude of the latter to the subject-matter of the litigation, that the application is made in the interest of the defendant rather than of the town, it should be denied. (*Farnham* agt. *Benedict*, 29 Hun, 44.)
6. The order of the special term directing such substitution to be made is reviewable upon appeal by the general term. (*Id.*)
7. Section 3331 of the Code of Civil Procedure, providing that where an officer had commenced the performance of a service for which a fee was allowed by the statutes theretofore in force, he is entitled to the fee so allowed, not to the fee allowed by said Code, applies to the services of a sheriff on attachment. (*Woodruff* agt. *Imperial Fire Ins. Co.*, 90 N. Y., 521)
8. A patrolman is an officer of the police force of the city of New York, and the salary referred to in the city charter of 1873 (*sec.* 43, *chap.* 335, *Laws* of 1873), is incidental to the office, to which, by reason of his title to the office, the incumbent acquires a right. (*People ex rel. Ryan* agt. *French*, 90 N. Y., 265.)
9. A construction given to the provision of the Code of Civil Procedure (*sec.* 1421), providing where action is brought against officer to recover chattels levied on by execution or attachment, if bond of indemnity has been given him

that the obligor may be substituted as defendant, and its effect stated. (*See Hessberg* agt. *Riley*, 91 N. Y., 377.)

PENAL CODE.

1. If the Penal Code is susceptible of such a construction as would interfere with the inter-state traffic of an express company, such provisions are unconstitutional and void, because they violate the provisions of the Constitution of the United States, which delegates to congress the exclusive power to regulate commerce among the several states. (*Adams Express Company* agt. *Board of Police*, ante, 72.)
2. Section 15 — Where crimes are defined in the Penal Code and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in this section of such Code is proper.
The court of special sessions of the city of Albany have jurisdiction to impose a fine of \$500 upon a person convicted of petit larceny. (*Matter of Hallenbeck*, ante, 401.)

PLEADING.

1. A plaintiff may in his complaint state several grounds or reasons for the relief demanded; and he also may, where there is some uncertainty as to the exact ground of recovery, so frame his complaint as to meet the contingencies of the trial. (*Velis* agt. *Newark City Ins. Co.*, ante, 1.)
2. Where a plaintiff has really ten distinct and separate reasons for the obtainment of the relief demanded in the complaint, and states each one therein separately and plainly, or where the plaintiff and his attorney are somewhat uncertain as to the exact ground of recovery the proof may

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afford, and therefore frame a complaint for the recovery of a single claim in several distinct counts or statements so as to meet the proof, an election will not be compelled. (*Id.*)

8. When the complaint was upon a promissory note made by the defendants jointly, and the defendant P. H. answering, alleged simply that at the time of its execution she was a married woman, and that the note was given for the indebtedness of a third party, one H. S. Hammond:

Held, that the answer was frivolous. It is not a sufficient allegation of coverture to defeat the action. (*Brand* agt. *Hammond*, *ante*, 264.)

4. The answer, in order to present a defense, should have set forth that the defendant is a married woman, and further that the note was not given in the course of her separate business or for the benefit of her separate estates. (*Id.*)

5. In an action brought for the foreclosure of a purchase-money mortgage, the defendant alleged in his answer fraud and deceit in the sale to him of the premises in question concerning the lien of a judgment affecting said premises, and demanded judgment for a cancellation of said mortgage, and a recovery by him of the amount paid thereon; or that the amount of the judgment be deducted from the amount of the mortgage. On a motion to have the answer made more definite and certain:

Held, that the motion should be denied. That a suggestion to the court of the various reliefs to which a party may be entitled upon his facts does not make the pleading either indefinite or uncertain (*This is adverse to Faulke* agt. *Kamp*, 40 *Superior Ct. Rep.*, 70). (*Lyke* agt. *Post*, *ante*, 298.)

6. The complaint was for the foreclosure of a mortgage charged

with a bond accompanying the same to have been executed for a good consideration by defendant to plaintiff and delivered to him, it did not aver that plaintiff was the owner and holder of such bond and mortgage. The answer contained no general denial, but, first, a denial that plaintiff was the owner and holder of the bond and mortgage, and second, an averment on information and belief that plaintiff was not the real party in interest:

Held, first, that the denial contained in the answer that the plaintiff is not the owner and holder of the bond and mortgage is bad, because it is a denial of no averment of the complaint. It therefore makes no issue for trial. If the facts averred give no cause of action, the defendant must demur, or by alleging and stating new facts making a defense he can on the trial test the sufficiency of the complaint by motion. But he cannot, by a denial of an unaverred fact, make an issue.

Second. As the complaint alleges the making and delivery of the bond and mortgage by the defendant to the plaintiff, the second allegation of the answer simply charging that the plaintiff is not the real party in interest is bad, because the answer, by not denying admits such allegation of the complaint, and avers no new fact, which, if true, avoids the effect of the admission. (*Grinnell* agt. *Church*, *ante*, 399.)

7. The defendant S. was charged in the complaint with having induced the plaintiff by false and fraudulent representations to accept certain worthless notes, for which a valid bond and mortgage were surrendered and satisfied. The complaint also charged that defendant S. with defendants Doe and Roe combined and confederated together in the perpetration of the fraud:

Held, that an order striking out the allegation of conspiracy and

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the names of Doe and Roe from the action, being productive of neither harm nor embarrassment to defendant, the law will not permit him to effectually complain of it. (*Woodruff* agt. *Schneider*, ante, 450.)

See MORTGAGE FORECLOSURE.

Scott agt. *Stockwell*, ante, 249.

8. Where an amendment to an answer is allowed on the trial, an amended answer need not be served, unless such service is made a condition of the allowance. The amendment becomes part of the record upon being allowed. (*Lane* agt. *Haywood*, 28 *Hun*, 583.)

9. It was alleged in the complaint in this action that the plaintiffs had been induced, by the false and fraudulent representations of the defendant, to sell and deliver to him certain specified parcels and quantities of tobacco; that the defendant, after obtaining possession of such tobacco, claimed that he was unable, and refused, to pay the plaintiff therefor; and alleged that such inability was occasioned by his having transferred all his property to his wife, in payment of an alleged prior indebtedness; the complaint also alleged that a return of the tobacco had been demanded. It prayed for a return of the tobacco, or if that could not be had, for its value. It was not alleged that the plaintiffs owned the tobacco. Upon a motion to set aside a requisition issued to the sheriff requiring him to replevy the tobacco and to vacate an order for the arrest of the defendant, granted on the ground that he had fraudulently disposed of the said tobacco so that it could not be seized by the sheriff: *Held*, that in determining whether or not the action was one of replevin, or to recover damages for a breach of contract, the prayer for relief might be considered. That although the complaint was defective in not alleging that the

plaintiffs were the owners of the tobacco, the action was to be regarded as one of replevin. (*Thompson* agt. *Strauss*, 29 *Hun*, 256.)

10. That the court had power to allow the plaintiffs to amend the complaint and the affidavits which were defective, and to deny both of the motions, without requiring the payment of any costs. (*Id.*)

11. In November, 1882, the plaintiff commenced this action to recover the price of goods sold and delivered to the defendant. The defendant alleged in his answer that a portion of the said goods were sold upon terms of credit which had not expired at the time the action was commenced. Thereafter, on the 9th day of February, 1883, the plaintiff obtained an order allowing him to serve a supplemental complaint alleging that the terms of credit upon which a portion of the goods were sold expired December 6, 1882, and the terms upon which another portion was sold expired January 13, 1883. The supplemental complaint was served to enable him to recover in this action the price of the goods which were sold upon a term of credit expiring after the action was commenced: *Held*, that the court erred in allowing him to serve the supplemental complaint. (*Holly* agt. *Graf*, 29 *Hun*, 443.)

12. A demurrer interposed to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action should be sustained, if the facts stated in the complaint do not entitle the plaintiff to the relief specifically demanded therein, even though they would have entitled him to some other or different relief had he demanded it. Where, in an action against several defendants upon a promissory note, the relief demanded is a judgment for the amount due thereon against the defendants and each of them, and the facts alleged show that the

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plaintiff is not entitled to such judgment, a demurrer to the complaint should not be overruled, even though the facts stated show that he is entitled to a judgment for an accounting. (*Edson* agt. *Girvan*, 29 *Hun*, 422.)

13. This action was brought to recover a sum of money intrusted by the plaintiff to the defendant's testator January 22, 1859. The defendant set up in his answer as one of the defenses to the action "that the claims of the plaintiff mentioned in said complaint, if not wholly fictitious, are stale and outlawed demands and have been wholly abandoned and lost by the laches of the plaintiff in not insisting upon the same during the lifetime of the testator, with whom the plaintiff was in daily intercourse, and the defendant claims the benefit of all statutes or rules of law or equity which may be invoked for the purpose of resisting the same, and which the evidence presented upon the trial may show to be applicable:" *Held*, that this was not a plea of the statute of limitations, and that the objection that the plaintiff's demand was barred by that statute could not be raised upon the trial. (*Budd* agt. *Walker*, 29 *Hun*, 348.)

14. The answer of the defendant, in this action, after denying certain of the facts set forth in the complaint, and setting up two separate defenses, proceeded: "Fourth, and, as a further and distinct defense to the matter set forth in the amended complaint, the defendant avers that it does not state facts sufficient to constitute a cause of action; that no cause of action has accrued to the plaintiff against the defendant, as alleged in the amended complaint, or of any kind or nature whatever:" *Held*, that the fourth clause of the answer did not profess to be, and was not to be treated as a demurrer, and that the court below erred in treating it as such and requiring

the defendant to elect whether he would stand by the answer or the demurrer. (*Barnard* agt. *Morrison*, 29 *Hun*, 410.)

PRACTICE.

1. No evidence should be presented to a grand jury which would not be legal and competent at the trial before the traverse jury. (*The People* agt. *Moore*, *ante*, 177.)
2. An indictment should be quashed when it appears by affidavit that it was found by the grand jury without adequate evidence to sustain it. (*Id.*)
3. A wife is not a competent witness against her husband, and cannot be called against him by the people without his consent. (*Id.*)
4. Where it appears by affidavit that the wife of a defendant was introduced as a witness before the grand jury without the consent and against the will of the husband (the defendant), and her testimony before the grand inquest being vitally material, the indictment should be set aside. (*Id.*)
5. Where parties to an action have been examined before trial, each at the instance of the opposite party, under section 870 of the Code of Civil Procedure, for the purpose of assisting such opposite party to prepare for trial, and such examinations are reduced to writing and signed by the respective parties, and the defendant subsequently dies and his representative is substituted in the case, whereby the plaintiff becomes incompetent under section 829 of the Code of Civil Procedure to give testimony concerning personal transactions had with the deceased:
Held, 1st. That the plaintiff could then prove such personal transactions by reading his previous deposition to the jury,

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although such deposition was taken by the defendant's counsel for their own benefit and not for benefit of plaintiff.

2d. That it was error to dismiss the plaintiff's complaint for lack of proof which was contained in such deposition.

3d. That a stipulation in the action made between the parties during the lifetime of defendant was not violated by his decease. (*McDonald* agt. *Woodbury*, ante, 228.)

6. An error in a summons as to the time within which the defendant must appear and answer does not render the process void. It constitutes a mere irregularity capable of amendment *nunc pro tunc*. (*Gibbon et al.* agt. *Freel*, ante, 273.)

7. When the statute requires service of process to be made out of the state or by publication within thirty days, and the thirtieth day occurs upon Sunday, a service made or publication commenced on the thirty-first day is a compliance with the statute. (*Id.*)

8. Where a demurrer is served, an answer may be interposed by way of amendment. (*Adams & Lang* agt. *West Shore, etc., Railroad Co.*, ante, 329.)

9. Where an issue is raised by the pleadings, in an action for damages, as to the proper construction of an agreement, specific performance cannot be decreed, without disposing of this issue, on payment by defendant of money into court to secure plaintiff from the damages. (*Wheeler* agt. *Braender*, ante, 452.)

10. The complaint in this action alleges "that the defendants were copartners; that between September 3, 1878, and December 3, 1878, both days inclusive, plaintiffs sold and delivered to defendants, as such copartners, certain goods and merchandise at the prices

agreed upon between the plaintiffs and defendants, as such copartners, and which amounts, in the aggregate, to the stipulated sum of \$6,269; that no part thereof has been paid;" and demanded judgment accordingly. The answer admits that the defendants were copartners, and "the sale and delivery of the goods as referred to in the complaint." It then set up, as a separate defense, that the goods were sold on a credit of four months, which term had not expired when the action was commenced; and then denied each and every allegation in the complaint not therein specifically admitted. *Held*, that the answer did not set up a substantial defense, but, in effect, denied that the defendants had promised to pay for the goods at a time prior to the commencement of the action. That the plaintiffs were entitled to open and close the case. (*Clafin* agt. *Baere*, 28 *Hun*, 204.)

11. Although the party holding the affirmative has a legal right to open and close the case, yet, when the defendant insists that he holds the affirmative, he must make it appear, beyond all reasonable doubt, that he has admitted, by his pleadings, all the essential facts upon which the plaintiff bases his right of action; and he cannot call upon the court to make a critical examination of the pleadings to determine whether or not he is entitled to the privilege he claims. (*Id.*)

12. Section 769 of the Code of Civil Procedure, prescribing the districts in which motions, upon notice, in an action in the supreme court, must be made, applies only to such motions as are made during the pendency of, or which relates to, the action, and not to such as may be made in proceedings instituted after the recovery and entry of a final judgment therein. (*Curtis* agt. *Greene*, 28 *Hun*, 294.)

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13. The papers used upon a motion so made after the entry of the final judgment, together with the order made thereon, must, however, be filed in the office of the clerk of the county where the judgment was entered, within ten days, or the order may be set aside as irregular, under the third general rule. (*Id.*)

14. A refusal of the court to find the several items constituting the sum found due in a foreclosure suit is not error, the general finding covers them, and it is not necessary to state them specifically. (*Sidenberg* agt. *Ely*, 90 N. Y., 257.)

15. When a preference is claimed on the calendar of this court, under the provision of the Code of Civil Procedure (*sec.* 791, *subd.* 7), giving a preference in "an action against a corporation * * * issuing bank notes or any kind of paper credits to circulate as money," and the fact thus giving a right to a preference does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference "must procure an order therefor from the court or judge thereof upon notice to the adverse party (*Sec.* 793). (*B'k of Attica* agt. *Met. Nat. B'k.*, 91 N. Y., 239.)

16. It is no excuse for a failure to procure the order that there was no term of the court at which a motion for the order could be made. Such a motion may be made on notice before any judge of the court, at his residence or office, or at any place which the judge, on application of the moving party, may name. (*Id.*)

17. Under the provision of the act of 1870 (*chap.* 78, *Laws* of 1870) in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the

death "which interest shall be added to the verdict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury in making up damages awarded in fact included the interest. (*Manning* agt. *Pt. H. Iron Ore Co.*, 91 N. Y., 664.)

18. *It seems*, that the remedy of the defendant in such case, if any, is to move to set aside the verdict (*Id.*)

PROMISSORY NOTE.

1. Where the indorser of a note paid it after an action had been commenced thereon against the maker:

Held, that such payment inured to the benefit of the indorser of the note, but did not furnish the maker with a defense thereon. By the payment the indorser acquired a cause of action against the defendant, and might have asked a substitution as plaintiff here; but the action did not abate, and, under the circumstances, was properly continued by the original plaintiff. (*Concord Granite Company* agt. *French*, *ante*, 317.)

RAILROADS.

1. Under the general railroad act of this state, a corporation, by proceedings thereunder, does not acquire the fee of the land condemned, but only the right of "use * * * for the purposes of its incorporation during the continuance of its corporate existence." Its acquisitions must therefore be limited to its corporate needs; and an objection to a petition asking for a commission to appraise property needed for the location of a railway, that it specifies only the surface use thereof as that to be acquired — the description being drawn in

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that form to avoid the payment for iron ore supposed to be below the surface—is not well taken, and must be overruled. (*Matter of Hartford and Connecticut Western Railroad Co., ante*, 133.)

2. In an action brought by plaintiff as owner of the fee since 1874, of premises situated on the north-westerly corner of Hudson and Laight streets in the city of New York, to recover damages sustained by reason of the closing of St. John's park, the erection of a freight depot thereon, the construction and continued existence of a steam railroad, through Hudson street, the operation of a railroad and the manner of its operation:

Held, 1st. That the plaintiff has no claim by reason of the discontinuance of the park or square or the erection or the mere continuance of a freight depot thereon. (*Green agt. New York Central and Hudson River R. R. Co., ante*, 154.)

3. Under the circumstances the plaintiff cannot complain that the depot erected by the railroad covers the whole area formerly occupied by the park or square. He is bound to show an easement in the park or square either by express grant or by dedication. In either case the burden of proof is upon him. No express grant is shown. (*Id.*)
4. Before the law will, in the absence of an express grant, protect a mere right to a prospect or air over land separated from the plaintiff's premises by an intervening street, it must affirmatively appear that the prospect and the air were within the contemplation of the original parties as objects of the dedication. (*Id.*)
5. The mere facts that Trinity church in 1797 had a map made of its property, which, among other parcels, contained a tract marked Hudson square, and that

in 1805 one of the plaintiff's predecessors in title purchased from Trinity church the premises in suit as a lot bearing a certain number on said map, do not establish that one of the objects for which the square was marked out was to secure to the lot sold a prospect and a passage of air over the space:

Held, 2d. That the plaintiff has no cause of action for damages by reason of the construction and continuous existence or maintenance of the railroad. (*Id.*)

6. The law of the public street of a city is motion. Any use of a street, though a new one, which does not materially abridge or obstruct the right of passage and repassage, of ingress and egress, and to light and air of the abutting owner, gives no cause of action; but every unnecessary material abridgement or obstruction, though of a temporary character, and every continuous material abridgement or obstruction, though made in the pursuit of a lawful business, and to some extent called for by circumstances arising in the course of such pursuit, by which the right of an abutting owner to pass and repass, to have free access to and egress from his premises, and to enjoy the light and air from the street, is unreasonably affected, gives to the injured party, in case of special damage therefrom, a right of action against the offending party for the recovery of the damages actually sustained; and in order to determine any such question each case must be disposed of on its own facts and circumstances. (*Id.*)
7. This principle applies to all infringements of and obstructions in the streets of a city, irrespective of their nature and of the persons by whom they are caused:
Held, 3d. That the plaintiff, upon the proofs now before the court, and such additional proofs

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as he has offered to give and may properly give upon the issues as now restricted, has the right to have his case submitted to the jury:

Held, 4th. That the rule of damage is the impairment of the rental value of the premises from the year 1874, when the plaintiff became the owner, to the time of the commencement of the action, and the impairment must be determined with reference to the condition in which the premises were in that year, and with reference to the uses for which the premises were then rented, or to which they could have been put in the condition they were in, but for the excessive exercise, if there was any, of defendant's business. But before any such special damage can be recovered it must appear affirmatively that it was directly and wholly caused by some act on the part of the defendant, which, within the rules laid down, was actionable if accompanied by special damage. (*Id.*)

8. In this case the jury rendered a verdict in favor of the plaintiff for six cents damages. (*Id.*)

9. An injunction should not be granted restraining a railroad from constructing an embankment on its own land, which is necessary to make its road-bed safe, because such embankment has already slipped and is liable to further slip on plaintiff's land and ruin a spring. (*Rider agt. New York, West Shore and Buffalo Railway Co., ante, 419.*)

REARGUMENT.

1. An order of general term denying an application for a reargument is not reviewable here. Whether more than one argument of a question shall be had is exclusively for the court in which it is pending to determine. (*Fleischmann agt. Stern, 90 N. Y., 110.*)

RECEIVERS.

1. Chapter 898 of the Laws of 1888, does not affect the fees of a receiver appointed previous to its passage, under chapter 902 of the Laws of 1869. (*The People agt. McCall, ante, 442.*)

2. When the services of an officer has been completed, and the work done on the faith of fees prescribed by a statute in force at the time of his appointment, a law which changes the amount to be paid for similar services should not be held applicable to it, unless expressly and plainly so declared. (*Id.*)

REFEREE.

1. Where it is shown that each of two attorneys (appearing, respectively, for different parties interested in two different actions, in each of which a reference has been ordered) has the cause of the client of the other in his hands to decide as a referee, a due regard for judicial propriety and for the pure administration of justice requires that upon the application of the opposing party in either action, made in due season and under circumstances showing that he has not waived his right to object, the court should vacate the reference and set aside the report, if one has been made. The question whether or not the referee has been influenced, or is likely to be influenced, by the relation adverted to is immaterial. (*Carroll agt. Lufkins, 29 Hun, 17.*)

2. A party cannot, however, after having permitted the reference to proceed and taken the chance of success, with full knowledge of the existence of the relation, move to set aside an adverse report upon that ground. (*Id.*)

3. The referee in this action, after the case had been finally closed and submitted to him, and before

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he had decided it, applied to the parties and their attorneys, verbally and by letter, to have his fees fixed to a sum largely in excess of what he would be entitled to receive if they were determined by the statutory rates, and sought to procure the execution of a stipulation to that effect. The plaintiff and one defendant seemed willing, while the other defendant refused, to execute it. Subsequently the referee notified the defendant who had expressed a willingness to execute the stipulation that he would deliver the report to him on receipt of a sum greater than his statutory fees. Thereafter a bond and mortgage were given to the referee by the said defendant and his son to secure the said fees, and the report was delivered to him. It was claimed that while the reference was pending the referee had expressed an opinion favorable to the defendant, against whom he finally decided: *Hehl*, that the court properly set aside the report and the judgment entered thereon. (*Greenwood* agt. *Marvin*, 29 *Hun*, 99.)

4. The referee's report was filed July 7, 1881, and judgment was entered thereon on July 12, 1881. In August following, notice of a motion to set aside the report because of the alleged misconduct of the referee was served. Thereafter, and on August twentieth, notice of an appeal from the judgment was served. September 2, 1881, the motion to set aside the report of the referee was denied for the want of proper papers. In February, 1882, the motion was renewed and granted: *Held*, that neither the denial of the first motion, the serving of the notice of appeal nor the delay deprived the defendant of his right to move to set aside the report. (*Id.*)

REMOVAL OF CAUSE.

1. Every action against a national bank is an "action arising under

the laws of the United States," and as such is removable to the circuit court of the United States under section 2 of the removal act of 1878. (*Cruikshank* agt. *Fourth National Bank*, ante, 280.)

2. Where, upon the removal of a cause from a state court, the copy of the record is not filed within the time fixed by statute, it is within the legal discretion of the federal court to remand the cause, and the order remanding it for that reason should not be disturbed unless it clearly appears that the discretion with which the court is invested has been improperly exercised. (*St. Paul and Chicago Railroad Company* agt. *McLean*, ante, 454.)
3. If, upon the first removal, the federal court declines to proceed and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled, under existing laws, to file in the state court a second petition for removal upon the same ground. (*Id.*)

RENT.

1. Prior to the passage of the act (*Laws of 1875, chap. 542*), there was, as a general rule, no apportionment of rents, except by agreement. The landlord or owner of the premises, at the time the rent became payable, collected and received the same, and the landlord or owner of the property during a part of the period such rent was earned, but not sustaining towards it either relation at the date the rent was payable according to the terms of the lease had no redress against the party receiving the payment except by special agreement. (*The People* agt. *Globe Mutual Life Insurance Co.*, ante, 81.)
2. By the statute (*Laws of 1875, chap. 542*), which reverses the common-law rule, the right to the rent fol-

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lows the ownership of the estate during the period it was earned by the property. (*Id.*)

8. Where prior "to the" 11th day of June, 1881, on which day E. became the owner thereof by a conveyance from F., E. occupied the premises as the tenant of F. By the terms of the lease the rent was payable on the first day of each month, in advance. With the transfer of this property by the deed on the 11th day of June, 1881, the lease was also assigned, but on that day the receiver demanded and received from E. the rent for the [property during such month of June, which by the lease had become due on the first day of the month and was a payment in advance:

Held, that as F. had title during eleven days only in the month of June, 1881, he had no right to receive and retain the rent for the entire month but was entitled to eleven-thirtieths thereof, and the remainder belonged to E., the owner, and that F. should restore to E. the amount of rent earned after the eleventh day of June. (*Id.*)

RULES.

1. The provision of the rule of the court of appeals (*Rule 7, as amended in 1880*), authorizing the admission of persons who have practiced three years in the highest courts of law of another country, applies only to the case of a citizen of the United States who has thus practiced. (*In re O'Neill*, 90 N. Y., 584.)

SERVICE.

1. When the statute requires service of process to be made out of the state or by publication within thirty days, and the thirtieth day occurs upon Sunday, a service made or publication commenced on the thirty-first day is a compli-

ance with the statute. (*Gibbon et al. agt. Freel, ante*, 278.)

SET-OFF.

1. The plaintiff, after having refused an offer made by the defendant to allow judgment to be taken against him for \$108, recovered a verdict for just that amount. The plaintiff entered a judgment for \$186.02 on December 14, 1878. On January 25, 1878, the defendant, who was insolvent, had assigned all his right, title and interest in any sum that might be allowed to him for costs to his attorney. On March 24, 1882, the defendant entered a judgment for the costs of thirty-eight dollars and sixteen cents: *Held*, that it was proper to allow the judgment recovered by the defendant to be set off against the one recovered by the plaintiff upon the latter's application. The proper way to enter judgment in such a case is, to suggest the right of the defendant to costs after offer, as taxed; and when the plaintiff's claim and costs are greater than the defendant's bill of costs, as taxed, to deduct the same from the plaintiff's claim and enter a judgment for the balance. (*Dinges. agt. Shears*, 29 Hun, 210.)
2. To warrant a set-off on motion, both claims must be such as have been determined by a binding adjudication. (*Goddard agt. Stiles*, 90 N. Y., 199.)

SHERIFF.

1. Where it does not appear upon the face of an order for the discharge of an imprisoned debtor whether it was made by the court or by a judge out of court, as the order must in all cases be made by the court, the sheriff is not to be subjected to an action for false imprisonment because he refused

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to discharge the debtor from imprisonment upon the order, especially after such debtor was advised that the order was defective. (*Hayes agt. Bowe, ante, 347.*)

2. January 9, 1882, the First National Bank of Oswego brought an action against one Dun and his assignee to replevy 10,000 bushels of malt, then lying with other malt in the malt-house in the possession of the assignee. The sheriff seized the malt and held it until January thirteenth. The defendants having given no bond, within the time prescribed by law, to entitle them to retake it, the sheriff then went to the president of the bank and told him he had come to deliver the malt, though it had never been separated from the residue thereof. The president accepted it and requested the sheriff to separate and deliver it to a designated place, which the latter agreed to do apparently as the agent of the bank. On January 13, 1882, the Second National Bank of Oswego recovered a judgment against Dun and issued an execution thereon under which the sheriff, in pursuance of its directions, levied upon the said malt. The Second National Bank claimed that the First National Bank's title to the malt was derived from an unrecorded chattel mortgage and was invalid as to judgment creditors of Dun: *Held*, that under the circumstances of this case the fact that the malt had been replevied did not prevent the sheriff from seizing it under the execution issued upon the judgment, and that the court erred in setting aside the levy and staying the proceedings upon the execution. (*First Nat. Bank of Oswego agt. Dun, 29 Hun, 529.*)

3. Chapter 251, of 1882, provided that the Albany county penitentiary should hereafter be the county jail of Albany county, and required the sheriff to remove the prisoners from the building

then occupied as a jail to the penitentiary. It made the superintendent of the penitentiary, who was appointed by the board of supervisors of Albany county, the jailor; gave him the custody and control of all persons confined therein, and required him to convey them to or from the jail when necessary or when directed by the sheriff. The superintendent was required to give to the sheriff a bond in the sum of \$15,000, conditioned for the faithful discharge of his duties as jailor: *Held*, that in so far as the act deprived the sheriff of the custody and control of the jail and the prisoners therein, and gave such custody and control to the superintendent of the penitentiary, it deprived the sheriff of common-law power and duties pertaining to his office, and violated the provisions of section 1 of article 10 of the constitution, requiring sheriffs to be chosen by the electors of the respective counties. The question as to what duties of an officer, whose election is provided for by the constitution, may be transferred to another officer, and as to the power of the legislature to entirely abolish certain powers and duties, considered. (*People ex rel. McEwan agt. Keeler, 29 Hun, 175.*)

4. The death of a judgment debtor while in the custody of the sheriff, under an execution issued against his person, does not entitle the sheriff to recover poundage from the judgment creditor. The right of a sheriff to poundage after the arrest of the judgment debtor depends upon some act to be done by the defendant or his friends, such as the payment of the judgment, or some act of the plaintiff, such as his consent to the debtor's discharge, or upon the application of some legal principle by which his discharge is accomplished. (*Flack agt. State, 29 Hun, 286.*)
5. A sheriff to whom an execution

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- upon the judgment has been issued, after notice of the assignment, may not take his instructions from plaintiff's attorney, but must obey his execution and conform to the rules of law in regard thereto, except as otherwise instructed by the assignee. (*Robinson agt. Brennan*, 90 N. Y., 208.)
6. It is the duty of the sheriff in making a sale on execution to demand payment for property sold; if not paid, he must then and there avoid the sale, and resell or postpone the sale, giving notice thereof. (*Id.*)
 7. If he closes the sale and gives credit or takes anything but money in payment, and delivers the property to the purchaser, what he receives must be treated as money and accounted for by him as such. (*Id.*)
 8. Section 8331 of the Code of Civil Procedure, providing that where an officer had commenced the performance of a service for which a fee was allowed by the statutes theretofore in force, he is entitled to the fee so allowed, not to the fee allowed by said Code, applies to the services of a sheriff on attachment. (*Woodruff agt. Imperial Fire Ins. Co.*, 90 N. Y., 521.)
 9. Where, therefore, an attachment had been issued to a sheriff, and he had levied upon property by virtue thereof prior to the enactment of said Code: *Held*, that the sheriff was entitled only to the compensation provided for by the Code of Procedure (*Sec. 243*). (*Id.*)
 10. The requirement, however, of the Code of Procedure that such compensation shall be fixed "by the officer issuing the attachment," was dispensed with as to the city of New York by the provisions of the Code of Civil Procedure (*sec. 26*), authorizing the continuance of proceedings commenced in that city "before a judge out of court in an action * * * in a court of record" by another judge of the same court. (*Id.*)
 11. The affidavits upon application of a sheriff for compensation for services under an attachment averred that he levied upon and attached a United States bond, sufficient to satisfy plaintiff's claim, and that thereafter defendant paid and settled said claim: *Held*, that enough was shown to make out a *prima facie* case on the part of the sheriff, from which, in the absence of evidence to the contrary, the court might infer that he did take possession, and so was entitled to compensation for his trouble and expense under said provision of the Code of Procedure. (*Id.*)
 12. The amount of such compensation being within the discretion of the court below, its order is not reviewable here. (*Id.*)
 13. The plaintiff in the attachment suit objected to any allowance on the ground that he was not liable for the compensation of the sheriff, as the latter should have looked to the lien he had upon the property attached, and required payment from the defendant before surrendering (*Code of Civil Procedure, secs. 8343, subd. 12, 709*): *Held*, that this question did not arise on appeal, as the order appealed from only fixed the amount the sheriff was entitled to, and did not determine who was liable therefor. (*Id.*)

SHERIFF'S FEES.

1. A contract made between the sheriff and defendant's attorney, whereby the latter agreed to pay keeper's fees and incidental expenses, provided the property levied upon under attachment was permitted to remain intact in

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defendant's stores, is valid and binding. (*Brown* agt. *Cooper*, ante, 126.)

2. Moneys paid the sheriff under such an agreement are not fees, and are not subject to taxation. (*Id.*)

SPECIAL SESSIONS.

1. Where crimes are defined in the Penal Code and are therein declared to be misdemeanors, and no punishment is therein prescribed, the punishment specified in section 15 of such Code is proper. (*Matter of Hallenbeck*, ante, 401)
2. The court of special sessions of the city of Albany have jurisdiction to impose a fine of \$500 upon a person convicted of petit larceny. (*Id.*)

SPECIFIC LEGACIES.

See WILL.

Shethar agt. *Sherman*, ante, 9.

SPECIFIC PERFORMANCE.

1. In an action by a vendor for a specific performance of a contract for the purchase of land, it appeared that for a portion of the premises the vendor and those through whom he claimed had no title by deed, but that their title and ownership rested upon adverse possession only:
Held, that the vendee was not bound to accept such title, or in equity to fulfill the contract. (*Schultz* agt. *Rose*, ante, 75.)
2. Also, that if the title, on close scrutiny, is not free from reasonable doubt and flaws, which indicate probable danger, sufficient to caution a prudent man against hostile claims of others, specific performance will not be decreed. (*Id.*)

3. Also, that a purchaser will not be obliged to take a title which depends upon a matter of fact which is not capable of satisfactory proof, or if capable of proof yet is not so proved; and if after the vendor has produced all the proof he can, a reasonable doubt still remains, the title is not marketable, and the purchaser is not bound to take it. (*Id.*)

4. Where an issue is raised by the pleadings, in an action for damages, as to the proper construction of an agreement, specific performance cannot be decreed, without disposing of this issue, on payment by defendant of money into court to secure plaintiff from the damages. (*Wheeler* agt. *Brender*, ante, 452.)

STATUTE OF LIMITATIONS.

1. Under section 91 of the Code of Procedure a party has six years in which to bring his suit in equity to set aside a deed on the ground of fraud, dating the time of limitation from the discovery of the fraud. (*Piper* agt. *Hoard*, ante, 228.)
2. Accordingly where the deed from F. P. to the defendant was dated March 26, 1859, and was recorded September 20, 1859; and in January, 1860, a suit was commenced in the name of F. P. to set aside said conveyance as fraudulent and obtained by undue influence, and shortly thereafter the defendant, through undue influence and fraud, compelled F. P. to discontinue said suit, and an instrument was executed providing for an arrangement and settlement of all differences and difficulties, the same being dated October 11, 1860. The plaintiff was born on the 6th of February, 1860; F. P. died on the 9th of March, 1860; the plaintiff became twenty-one years of age on the 6th of Febru-

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ary, 1881. In an action commenced on the 19th of February, 1881, by the plaintiff, who is a daughter of F. P., to have the deed from him to defendant declared fraudulent and void:

Held, 1st. That the relief demanded is purely equitable in its nature, for a court of equity alone has power to entertain actions to set aside or annul conveyances and agreements on the ground of fraud.

2d. There was a period of sixteen years, during any part of which F. P. could have commenced an action for the same relief in substance that the plaintiff demands in her complaint.

3d. Whatever right the plaintiff has to maintain this action came to her by inheritance from her father. She took such right of action in the precise condition that it was when her father died. The statute having run as to him when he died, it has run as to her.

4th. The rule as to disabilities is that when the statute begins to run, it is not arrested by any subsequent disability, unless expressly as provided in the statute, and a person who claims the benefit of the general exceptions in the statute can only avail himself of such disabilities as existed when the right of action first accrued, so that when the statute has begun to run against the ancestor it is not suspended by any statutory disability in the heir at the time of the descent cast. Therefore, the time that elapsed from the date of F. P.'s death to the date when this action was commenced should be added to the period that the statute had run before his death, making more than twenty years. Hence, even if this were an action for the recovery of real property, it would fall within the statute.

5th. No such disability as long continued undue influence is provided for by the statute. Until the undue influence ripens into a cause of action, the statute does

not begin to run, but when it has so ripened and the right of action is complete, the continued exercise of the same influence over the person defrauded, in order to prevent him from suing, does not affect the operation of the statute. (*Id.*)

STREETS.

1. The placing of poles necessary for the purpose of bearing the wires which transmit the electricity to the electric lamps for lighting the streets, is among the public uses to which a street may properly be devoted. (*The People ex rel. McManus agt. Thompson, ante, 407*)

See RAILROADS.

Greene agt. N. Y. C. and H. R. R. R. Co., ante, 154.

SUMMARY PROCEEDINGS.

1. To maintain summary proceedings to remove a judgment debtor after a sale of leasehold interests on execution, the sale must be advertised and conducted as a sale of real property. Advertising and selling such interests as personal chattels do not satisfy the statutory requirement in regard to summary proceedings. (*Mitnacht agt. Cocks et al., ante, 84.*)
2. The execution of the warrant in summary proceedings for dispossession of a tenant will not be stayed when the plaintiff has a remedy at law. (*Bradwell agt. Holcomb, ante, 502.*)
3. The remedy by injunction is confined to cases and conditions in which it might be granted to stay the execution of a judgment in an action of ejectment. (*Id.*)

SUMMONS.

1. An error in a summons as to the time within which the defendant

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must appear and answer does not render the process void. It constitutes a mere irregularity capable of amendment *nunc pro tunc*. (*Gibbon et al. agt. Freel, ante, 273.*)

SUPERVISORS.

1. A board of supervisors of a county may, under chapter 483 of the Laws 1875, create and give to county officers a clerk. (*The People ex rel. Masterson agt. Gallup, ante, 108.*)
2. The resolution of the board of supervisors of Albany county, creating and giving to the coroners of such county a clerk, and fixing his compensation, is not in violation of section 24 of article 3 of the Constitution, which forbids the legislature, common council of a city or the "board of supervisors" to grant any extra compensation to any public officer, servant, agent or contractor. (*Id.*)
3. An officer who has received money raised by tax for a specific purpose, cannot successfully resist the payment of the money to the person for whom it was levied and collected, upon the ground that the local law under which it was obtained was invalid. (*Id.*)
4. The supervisors having the power to pass the resolution, the want of a seal cannot affect their action. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. When supplementary proceedings were instituted upon return of an execution, and during the course of the proceeding ten dollars costs were allowed by the judge, and also the further sum of thirty dollars at the close of the examination, when a receiver was appointed:
Held, that the ten dollars al-

lowed by the court are clearly motion costs and are collectible by execution.

Held, further, that in supplementary proceedings the final costs cannot be deemed motion costs, and are not, therefore, collectible by execution. (*Valiente agt. Bryan, ante, 208.*)

2. Proceedings supplementary to an execution may be taken upon a judgment for *costs only*, rendered against a plaintiff. Appearance is predicable of every party to an action who submits himself to the jurisdiction of the court, whether plaintiff or defendant, and plaintiff's appearance in the action is complete when a summons in proper form, signed by himself or his attorney, has been served upon the defendant. (*Davis agt. Herzig, ante, 290.*)
3. An affidavit which states that H. was indebted to the judgment debtor in a sum exceeding ten dollars, to wit, \$100, is sufficient to give the judge jurisdiction to grant an order to examine a person having property of a judgment debtor. A man is indebted equally whether a debt is due or to become due. (*Id.*)
4. The court has no power, without personal notice to the judgment debtor, to make an order directing a receiver appointed in supplementary proceedings, to apply any portion of the funds coming to his hands in payment of judgments other than that under which he was appointed, or those to which his receivership has been extended as prescribed by the Code of Civil Procedure (*Sec. 2464, et seq.*). It is his duty to restore to the judgment debtor any surplus after the satisfaction of these judgments, and such an order made without notice to the debtor is not binding upon him, and would be no protection to the receiver. (*Goddard agt. Stiles, 90 N. Y., 99.*)

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SURROGATES.

1. Except where an appellate tribunal has given directions in the premises the surrogate has no power to award compensation to special guardians, for services rendered by them as such special guardians in proceedings on appeal from orders or decrees of this court; nor with that exception has he any power to make to them or to any other persons in their capacity as parties to such proceedings any award as costs or allowances. (*Matter of Hewitt, ante, 187.*)
2. Surrogates have power, under the Code of Civil Procedure, to hear and determine controversies in regard to the title to, or any question concerning a legacy or distributive share under a will. (*Matter of Brown, ante, 387.*)
3. Costs can only be awarded to a party and not to counsel or attorneys. If a party have a dozen counsel he can be awarded no more costs than if he had but one. (*Matter of Brown, ante, 461.*)
4. Under section 2561 of the Code of Civil Procedure, in cases of a contest, the limit which the surrogate cannot exceed in awarding costs is seventy dollars, and in addition ten dollars per day, less two, for each day actually occupied on the trial upon the merits. The time which may have been spent by an attorney in preparing pleadings, making briefs, ascertaining facts, appearing merely where the case is for any cause adjourned, and appearing to settle the decree, can none of them be regarded as any part of the trial or hearing upon the merits for which a per diem allowance can be made under that section. But a summing up or argument made to the court must be regarded as a hearing upon the merits. (*Id.*)
5. Under section 2562 of the Code of Civil Procedure, executors and administrators may, in addition, be awarded such a sum as the surrogate decrees reasonable for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied in preparing his account for settlement, and otherwise preparing for the trial. (*Id.*)
6. In order that the surrogate may act understandingly in making an allowance, under section 2561, an affidavit should be presented specifying the number of days occupied in the trial or hearing upon the merits. The affidavit to be presented on the part of an executor should, in addition, state separately the number of days necessarily spent in preparing the account for settlement, and the number of days consumed in preparing for trial; that a gross number of days have been occupied in making up and preparing the accounts of the executor, in preparing for trial and in the actual trial, is not sufficient. The number of days occupied in each class of work should be stated. (*Id.*)
7. In all cases a bill of costs, allowances and disbursements should be prepared precisely as is the practice in the supreme court, and notice of taxation be given in the cases and manner required by that court. The stenographer's fees should be paid by the proper party, and the amount be included in the disbursements, &c., in his bill of costs, the same as if they were referee's fees in the higher courts. (*Id.*)
8. Under the Code of Civil Procedure where an execution can be issued against the property of one who is ordered by a decree of a surrogate to pay money to a party, execution must be issued and returned unsatisfied in whole or in part before proceedings for con-

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tempt can be instituted as provided for in said Code (Secs 2554, 2555). (*In re Dissoway*, 91 N. Y., 235.)

9. Proceedings were instituted in May, 1881, to punish certain persons for alleged contempts in not complying with a decree of a surrogate requesting them to pay a sum of money. No execution had been issued upon the decree:

Held, that the proceeding to punish for contempt was not a continuance of the original proceedings in which the decree was made, but was a special proceeding; and so said provisions of the Code are made applicable to it (Sec. 8347, subd. 11). (*Id.*)

10. As incident to the duty imposed upon surrogates by the Code of Civil Procedure (secs. 2473, 2481, 2748), to settle the accounts of executors and to decree distribution of the estate remaining in their hands "to the persons entitled, according to their respective rights," a surrogate has jurisdiction to construe a will, so far as is necessary, to determine to whom legacies shall be paid. (*In re Will of Verplanck*, 91 N. Y., 439.)

TAXATION.

1. It is the manifest purpose of all the legislation upon the subject to put the responsibility of assessment, namely, the fixing of the value of property for taxation, in the city of New York, upon the tax commissioners alone. (*McMahon* agt. *Beekman*, ante, 427.)
2. The day when the assessment must be deemed to be made, and be final (except in cases of amendments and corrections of mistakes specially provided by statute), is the second Monday of January in each and every year. (*Id.*)
8. Although the machinery necessary to secure revenue from per-

sonal property has necessarily to act upon the individual, it is the property itself, and not the person, that bears the tax, and the change of ownership, or condition of the individual relatively to the property, after the value is fixed, cannot operate to relieve the property from the tax. (*Id.*)

4. Where a party died, June twenty-second, after the time when the annual record was placed in the hands of the tax commissioners (*i. e.*, second Monday of January) and after it was closed against correction (*i. e.*, first day of May), but before the delivery of the rolls by them to the board of aldermen (*i. e.*, July first):

Held, that the assessment of his personal estate was completed before his death, and consequently a recovery for such tax could be had against his executors. (*Id.*)

TITLE.

See SPECIFIC PERFORMANCE.

Schultz agt. *Ross*, ante, 75.

TRIAL.

1. In an action to recover damages for personal injuries caused by negligence, it was proved that plaintiff was engaged in business at the time of the injury, but had not been able to attend to it since; it was not shown what his business was, or the value of his time, or any facts as to his occupation, from which the value could be estimated. The court charged that plaintiff, if entitled to a verdict, was "entitled to recover compensation for the time lost:" *Held*, error, as the jury was left to guess at or speculate upon the value of the lost time, without any basis in that respect for the judgment to rest upon. (*Leeds* agt. *Met. G. L. Co.*, 90 N. Y., 26.)

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2. In an action upon a contract, a tender is not available as a defense unless pleaded. (*Sidenberg* agt. *Ely*, 90 N. Y., 257.)
3. Where a tender is not pleaded, and the trial is by the court, although proof was made on the trial of a tender, or a waiver thereof, a refusal of an application to have the answer amended to conform to the proof, made after the trial and after the findings have been prepared and ready for signature, is not error. (*Id.*)
4. While the court cannot on trial be called upon as a matter of right to instruct the jury as to the consequences which may flow from their verdict, it may, in its discretion, so instruct them. (*Keller* agt. *Strasburger* 90 N. Y., 379.)
5. In an action to recover for goods sold, the complaint contained no allegations of fraud on the part of the vendee; an order of arrest, however, was issued and executed, and upon the trial plaintiff gave evidence tending to show that at the time of making the purchase, and to induce the credit defendant made false representations as to his solvency. The court in submitting the questions of fraud to the jury stated in substance that if the facts as to the fraud claimed by plaintiff were found by the jury, the law gave him an additional remedy, i. e., a body execution and imprisonment under it, and it was for the jury to determine whether plaintiff was to have this right as the result of their verdict, or simply to be remitted to the ordinary rights of a creditor. Held, no error (*Code of Civil Pro.*, sec. 1487). (*Id.*)
6. On the trial of an action against a railroad corporation for negligence causing injury to plaintiff at a crossing, evidence was given, without objection, as to whether the bell was rung or not as the engine approached the crossing. At the close of the charge the defendant's counsel asked the court to charge that that question had no bearing upon the issue. The court, in reply, said to the jury: "I do not think it has, but if you think otherwise you are not bound by my opinion." Held, no error. (*Schwier* agt. *N. Y. C. and H. R. R. Co.*, 90 N. Y., 558.)
7. A stipulation made before the trial of an action as to the facts therein does not, in the absence of a provision in the stipulation to that effect, preclude the parties from giving other evidence. (*Dillon* agt. *Cockcroft*, 90 N. Y., 649.)
8. It seems, that if, in consequence of the stipulation, a party is unprepared to meet evidence against him, produced on the trial, he may apply for a postponement, or for leave to withdraw a juror. (*Id.*)
9. Where upon a trial the parties do not ask to go to the jury on the facts, but the defendant moves to dismiss the complaint, and the plaintiff moves the court to direct a verdict, this is, in effect, an agreement to submit the questions of fact to the court, and if there is any evidence to uphold the decision, it will be sustained. (*Id.*)
10. Where there is simply a general objection to evidence, the decision of the trial court overruling the same will be sustained unless there be some ground which could not have been obviated if it had been specified, or unless the evidence called for was in any aspect of the case incompetent. (*Quinby* agt. *Strauss*, 90 N. Y., 664.)
11. Where the contents of an instrument alleged to have been destroyed are sought to be proved by oral evidence, it is for the court to determine whether the evidence establishes the destruction, and whether, if established, the destruction was not intended to

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injure the opposite party or to create an excuse for its non-production. (*Mason* agt. *Libbey*, 90 N. Y., 688.)

TRUSTS.

1. The testator in his will directed that one-half the interest from his residuary estate should be paid to A. during life, and one-half to B. during life. On the death of A., his share the testator directed should be divided between C., D. and E., share and share alike, for life; and that upon the death of B. her share of the income should also be divided between C., D. and E. for life. The testator directed that at the death of all these beneficiaries the estate should be given to F., if of age, and if he should be a minor, that it be held in trust for him until he arrived at his majority:

Held, that though taken as a whole, the testator's disposition of his estate transgresses the statutes against perpetuities, yet, the several bequests of income being independent and stated separately, the invalid portion may be dropped and the residue be allowed to stand. The provisions for A. and B. are valid, and though there may be some doubt as to that for C., D. and E., yet, as upon the death of either, his or her share does not go to the survivors, there is no illegal suspension of the power of alienation. The provision for F. is void, and after the termination of the interests in favor of A., B., C., D. and E., the testator died intestate. (*Levitt* agt. *Wolcott*, ante, 51.)

2. Where an estate is vested in trustees upon several trusts, one or more of which is valid and another void, the latter will be rejected, and the estate of the trustees upheld to the extent necessary to enable them to execute the valid trusts, provided they are separable. (*Id.*)

3. The right of a husband to administer upon the estate of his deceased wife confers upon his legal representative the capacity to sue for a chose in action belonging to the wife at the time of her death, and not reduced to possession by the surviving husband in his lifetime. (*Gilman* agt. *McArdle*, ante, 830.)

4. Moneys belonging to the wife of plaintiff's intestate were placed by her in the hands of defendant, with the direction and upon the condition that after the death of herself and her husband he should use the fund to have masses said by a Roman Catholic priest for the repose of their souls:

Held, that though such a use is not void upon general principles of public policy, and the trust is not invalid, because it relates solely to personal property, nor because it was not declared in writing, yet it cannot be upheld, because there is no beneficiary or *cestui que trust* in existence, or capable of coming into existence under it; and if the trust fails, the disposition made of the money cannot stand, because it amounted neither to a gift nor to a disposition by last will and testament. There was only a mere naked deposit of money into the hands of the agent, with certain instructions concerning the employment and payment from time to time of a third person, namely, a Catholic priest, for services to be rendered, and the principal may at any time revoke the instructions and recover his property, and if he does not do so in his lifetime, and dies intestate, his death revokes the authority of the agent, and as the title must go somewhere, it goes to the administrator of the intestate. From the moment the administrator objects, the agent must cease paying out. But up to that time he will be protected for acts done in good faith. (*Id.*)

See WILL.

Weeks et al. agt. *Cornwall*, ante, 418.

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UNDERTAKING.

1. Where the sureties to an undertaking, given to stay proceedings, on appeal to general term from a final judgment are excepted to, and they fail or refuse to justify, and justification is not waived by the respondent, the sureties are discharged from liability; the effect of the failure to justify "is the same as if the undertaking had not been given" (*Code, secs. 1852, 1885*). (*Manning agt. Gould, 90 N. Y., 476.*)
2. As to whether the respondent may after exception taken, and before the refusal of the sureties to justify, waive the exception, *quære*. (*Id.*)

USURY.

1. Where, in a foreclosure action in which the defendant interposed the plea of usury and plaintiff had judgment in his favor at special term, the general term directed a retrial, with a submission to a jury of the question of usury, the fact subsequently set up by amended pleadings that since the joining of issue the mortgagor had sold his interest in the mortgaged premises, and had also been adjudicated a bankrupt, did not change the legal status of the parties, and the question of usury must be submitted to a jury for trial. (*Deekin agt. Shannon, ante, 148.*)

VENDOR AND VENDEE.

See CONTRACT.

Smith agt. Sturgess, ante, 360.

VERIFICATION.

1. A verification to a mechanic's lien that the statements therein contained were true to the best of the affiant's information and belief

is insufficient, and as the lien in such case fails, the court cannot entertain the proceeding for the purpose of granting a personal judgment. (*Childs agt. Bostwick, ante, 146.*)

WILL.

1. A., who died in 1844, leaving two sons and two daughters, by his will gave his residuary estate to his son B. and to his heirs; but in case B. should die without lawful issue, he gave it "to my remaining children, share and share alike." The other son died in 1859, leaving four children, the plaintiffs in this action. B., the residuary devisee, died in 1881, without issue:

Held, that plaintiffs are entitled to their father's one-third interest in the estate. (*Kingsland et al. agt. Leonard et al., ante, 7.*)

2. By the different clauses of the testator's will, gifts of railroad stock owned by him were made to his children, and to other persons and societies, literary and religious, in various amounts. By the twenty-fourth clause he directed, that should there be a deficiency of assets to pay in full all the bequests, the bequests to his children in the first four clauses should first be fully paid:

Held, that the gifts of railroad stock were not severally specific legacies required to be paid in full, without reference as to whether there were assets to pay the pecuniary legacies provided in the first four clauses. (*Shelhar agt. Sherman, ante, 9.*)

3. Parol contemporaneous evidence not admissible to show intention of testator. (*Id.*)

4. Where the testator gave the residue of his estate to his brother and sister, "their heirs, executors, administrators and assigns," and the brother died before the testator,

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leaving children, but the sister survived him:

Held, that the gift being of the whole residuary estate to the two persons named and not a share of it to each, the sister who survived the testator by force of the will itself took the whole property. The words "their heirs, executors and assigns" being mere words of limitation and not of purchase, do not have the effect of substituting the heirs of the brother in place of their ancestor upon his death, and do not affect the application of the rule that as the brother and sister take as a class, the survivor, in the event of the death of one of the beneficiaries in the testator's lifetime, takes the whole. (*Howard et al. agt. Barnes et al., ante*, 122.)

5. The testatrix, by her will, gave \$1,000 to each of her executors, "in addition to the commissions or allowances they would be entitled to by law," as such executors. After the will had been offered for probate, but before it was actually proved, one of the executors named therein died:

Held, that the deceased executor having accepted the trust and performed acts which showed an intention to assume all the responsibilities and duties of the office, it is sufficient to entitle his representatives to the legacy, although they might not have a legal claim for commissions. (*Scotfield agt. St. John, ante*, 242.)

6. The testatrix directed that \$8,000 be applied in the purchase of a house and lot in the city of New York, the use of which she gave to her housekeeper during life, and on her death the house to go to the niece of testatrix:

Held, that the clause is valid, and not void as being a naked and inactive trust, as, if the duties imposed are in the nature of a trust, they are not wholly inactive. (*Id.*)

7. The testator, after making specific legacies, gave his wife, during her

life, four houses in Fifth avenue, devising the remainder, after the life estate, by the twenty-fourth clause of his will, to his executors, "upon trust to use the same as in their judgment they deem to be for the best interest of my whole estate," with power to mortgage the land for any sum in their discretion, and after paying and keeping paid all taxes and assessments upon the property, and after expending such amounts as they may deem necessary to keep the said premises in good order and repair and properly insured against loss and damages by fire, to divide and pay the remainder at any time within ten years to each and every of his legatees (except two servants), &c. By the twenty-fifth clause, the testator gave the fee of this Fifth avenue property "to each and every one of my legatees herein named (except two servants) to be divided among such legatees in the proportion which his, her or their specified legacies hereinbefore named and bequeathed, bear to each other:"

Held, that the twenty-fifth clause is a plain and legal devise of the Fifth avenue property to take effect upon the termination of the trust estate created by the twenty-fourth clause, and is not void for uncertainty, either as to the objects of the testator's bounty or their relative proportions. The twenty-fourth clause, however, is invalid, the trust attempted to be created being too indefinite, and the discretion vested in the trustees too wide to be upheld, and the lands sought to be partitioned vested on the termination of the life estate in the persons designated as the testator's legatees, and by him declared to be his legal heirs (*See S. C., 64 How.*, 276). (*Weeks et al. agt. Cornwell, ante*, 418.)

8. The testator gave a portion of his estate to his son absolutely. The son died before his father, leaving

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a widow and children. He left creditors, but no property, except that to be derived from his father's estate:

Held, that under the statute, which enacts that the legacy, in case of the death of the legatee before the testator, shall vest in the surviving child or descendant of the legatee, the devised estate, on the death of the testator, vested absolutely in the children of the legatee, and that his widow and creditors have no interest in it. (*Cook et al. agt. Munn, ante, 514.*)

See TRUSTS.

Leavitt agt. Wolcott, ante, 51.

WITNESS.

1. A refusal to answer a question on the ground of the tendency thereof to convict of a crime is a personal privilege of the witness, and to be urged when the question is put. (*Canada Steamship Co. agt. Sinclair, ante, 474.*)
2. Unless it appear that the testimony sought by an examination before trial relates exclusively to facts which, if proven, would show that the witness was guilty of a crime, the order therefor will not be set aside. (*Id.*)
3. The mere possession of goods which have been stolen, not being necessarily inconsistent with innocence of the crime of "receiving stolen goods," a witness should be left to urge his privilege, if it exist, on the examination itself. (*Id.*)

See HUSBAND AND WIFE.

The People agt. Moore, ante, 177.

4. The corroborative proof to connect the defendant with the commission of a crime, required by section 899 of the Code of Criminal Procedure, where a conviction is sought upon the testimony of an accomplice, is sufficient to

authorize the submission of the case to the jury in a prosecution for forgery in raising and altering a check, where it appears by such proof, unexplained by the defendant, and in addition to the testimony of the accomplice, that the defendant got the check by an untrue representation that was to be sent to her mother; that she caused it to be made payable to a fictitious person; that she obtained the check one evening, and that on the next day but one it was presented in its forged condition and paid, within a time which almost precluded its having been sent to the place where her mother lived. The evidence on a trial of a married woman for forgery tended to show a confederation of several persons to take various steps intended to, and which did, result in the commission of a crime. From the evidence it might be inferred that the participation of each was prearranged — the defendant to procure the check, which could be altered; her husband to make the alteration; the accomplice to get the money on it through some third person: *Held*, that there was sufficient proof, assuming that the jury gave it credit, to show that the appellant was a principal, and not a mere accessory. That it would not be proper, under such circumstances, for the court to take the case away from the jury on the ground that the defendant (the wife) acted under the coercion of her husband. (*People agt. Ryland, 28 Hun, 568.*)

5. The defendant was convicted of a violation of the excise law, in selling beer in quantities of less than five gallons without a license. All the evidence under which he was convicted was given by the person to whom the sale was made. The defendant objected that, under section 899 of the Code of Criminal Procedure, prohibiting a conviction "upon the testimony of an accomplice, unless he be

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- corroborated by such other evidence as tends to connect the defendant with the commission of a crime," she could not be convicted upon the uncorroborated testimony of a witness: *Held*, that the objection was untenable. That as the excise law made only the person selling, and not the purchaser, guilty of a criminal act, the purchaser was not an accomplice within the meaning of the said section of the Code. (*People* agt. *Smith*, 28 *Hun*, 615.)
6. *It seems*, that under the circumstances of this case the question whether or not the witness was an accomplice was properly decided by the court, instead of being submitted to the jury. (*Id.*)
7. The corroborating evidence, required by section 899 of the Code of Criminal Procedure to justify a conviction upon the testimony of an accomplice must be as to facts independent of the evidence of the accomplice, which, taken by themselves, lead to the inference not only that a crime has been committed, but that the prisoner was implicated in it. Evidence that the prisoner was frequently in the society of the accomplice under circumstances of a suspicious character, is not sufficient. (*People* agt. *Courtney*, 28 *Hun*, 589.)
8. In an action to recover the penalty given by the statute, from a witness who has failed to attend a trial, the plaintiff must show that the witness was material and that damages resulted from his non-attendance. (*Carrington* agt. *Hutson*, 28 *Hun*, 371.)
9. There is nothing in section 858 of the Code of Civil Procedure to change this rule. (*Id.*)

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